

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE MILLER RUBBER COMPANY, a Corporation,  
and THE MILLER RUBBER COMPANY OF CALIFORNIA, a Corporation,  
Appellants,  
vs.

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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Filed

JAN 2 1916

F. D. Monckton,

Clerk

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.



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## INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of C. R. Wetsel in re Depositions and Claim of the Miller Rubber Company et al.	
.....	116
Affidavit of Norman A. Bailie in re Depositions.	121
Affidavit of W. C. Smith in re Depositions and Proof of Claim of the Miller Rubber Com- pany et al.....	110
Agreement Dated November 6, 1911.....	90
Agreement Dated June 11, 1914.....	95
Agreement, Dated June 11, 1914, Supplemental.	105
Amended Petition.....	8
Answer of Citizens Trust and Savings Bank, re- ceiver, to the Petition of Miller Rubber Co.	14
Assignments of Error on Appeal of Citizens Trust and Savings Bank.....	170
Assignments of Error on Appeal of Miller Rub- ber Co. et al.....	141
Attorneys Names and Addresses of on Appeal of Citizens Trust and Savings Bank.....	165
Attorneys, Names and Addresses of, on Appeal of Miller Rubber Co. et al.....	1
Bond on Appeal of Miller Rubber Co. et al....	135

Index.	Page
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal of Citizens Trust and Savings Bank.....	178
Certificate of Clerk, U. S. District Court to Transcript of Record on Appeal of Miller Rubber Co. et al.....	159
Citation on Appeal of Citizens Trust and Sav- ings Bank (Original).....	166
Citation on Appeal of Miller Rubber Co. et al (Copy).....	140
Citation on Appeal of Miller Rubber Co. et al. (Original).....	2
Conclusions of Special Master.....	86
Exceptions to Report of Special Master.....	123
<b>EXHIBITS:</b>	
Exhibit—Day Letter, November 12, 1914, W. D. Newerf Rubber Co. to Miller Rubber Co. .....	32
Exhibit—Night Letter, September 10, 1914, W. D. Newerf Rubber Co. to Miller Rubber Co. ....	31
Miller's Exhibit No. 9—Letter, September 14, 1914.....	52
Miller's Exhibit No. 10—Letter.....	55
Miller's Exhibit No. 11—Letter, December 3, 1914 .....	56
Miller's Exhibit No. 13—Night Letter.....	54
Receiver's Exhibit—Letter, August 22, 1914.....	50
Receiver's Exhibit No. 1—Letter, June 24, 1914.....	41

## EXHIBITS—Continued:

Receiver's Exhibit No. 2—Letter July 23, 1914.....	43
Receiver's Exhibit No. 3—Letter, August 13, 1914.....	47
Receiver's Exhibit No. 5—Letter, August 28, 1914.....	51
Trustee's Exhibit "A"—Letter, Miller Rubber Co., Akron, Ohio to Miller Rub- ber Co., Los Angeles, Cal.....	57
Trustee's Exhibit "B"—Letter, October 15, 1914.....	58
Names and Addresses of Attorneys on Appeal of Citizens Trust and Savings Bank.....	165
Names and Addresses of Attorneys on Appeal of Miller Rubber Co. et al.....	1
Notice of Motion to Receive Depositions in Evi- dence, etc.....	155
Notice to Take Depositions of C. Douglas Lane et al.....	108
Objections to Report of Audit Company.....	40
Objection to Taking of Depositions.....	109
Order Allowing Special Master's Fee of \$200, etc.....	133
Order Allowing Transcript on Appeal of Miller Rubber Co. et al.....	158
Order Approving Bond, etc. ....	18
Order Confirming Special Master's Report, Ex- cept as to Allowance of Commissions, to Miller Rubber Company, etc.....	132

Index.	Page
Order Extending Time to February 1, 1916, to File Transcript (Copy).....	157
Order Extending Time to February 1, 1916, to File Transcript (Original).....	162
Order Granting Appeal and Fixing the Amount of Bond on Appeal of Miller Rubber Co. et al. ....	138
Order Granting Appeal of Citizens Trust and Savings Bank.....	173
Order of Reference.....	107
Order of Referee in Bankruptcy on Petition of Miller Rubber Company.....	19
Order Referring Matter to Special Master.....	17
Petition, Amended.....	8
Petition on Appeal of Citizens Trust and Sav- ings Bank.....	168
Petition on Appeal of Miller Rubber Co. et al. .....	134
Praecipe for Transcript of Record on Appeal of Citizens Trust and Savings Bank.....	177
Record on Appeal of Citizens Trust and Sav- ings Bank, Transcript of.....	163
Special Master's Report.....	59
Stipulation as to Time of Filing Petition in Bankruptcy, etc.....	6
Stipulation for Transcript on Appeal of Miller Rubber Co. et al.....	4
Stipulation that Record on Appeal of Miller Rubber Co. et al. may be Used as Record on Appeal of Citizens Trust and Savings Bank	7

## Index.

## Page

Stipulation That Transcript is True and Correct, etc. ....	159
Stipulation That Transcript on Appeal of Miller Rubber Co. et al. may be Used as Transcript on Appeal of Citizens Trust and Savings Bank.....	175
Supplemental Agreement, Dated June 11, 1914. ....	105
 TESTIMONY:	
NEWERF, W. D. ....	24
PFEIFFER, WILLIAM F. ....	36
ROE, JOHN F. ....	32
WETSEL, CHARLES R. ....	33
Transcript of Record on Appeal of Citizens Trust and Savings Bank.....	163



**Names and Addresses of Attorneys [on Appeal of  
Miller Rubber Co., et al].**

[1\*] BICKSLER SMITH & PARKE, 829 Citizens' National Bank Bldg., Los Angeles, California,

Attorneys for the Miller Rubber Company,  
and the Miller Rubber Company of  
California.

W. T. CRAIG, 731 Higgins Bldg., Los Angeles, California,

NORMAN A. BAILIE, 831 Higgins Bldg., Los Angeles, California,

DAVE F. SMITH, 626 American Bank Bldg., Los Angeles California,

Attorneys for the Trustee in Bankruptcy.

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[Original endorsed]: Filed Jan. 13, 1916. At 40 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Leslie S. Colyer, Deputy.

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\*Page-number appearing at top of page of original certified Record.

*In the District Court of the United States for the  
the Southern District of California, Southern  
Division.*

THE MILLER RUBBER COMPANY, THE MIL-  
LER RUBBER COMPANY OF CALIF.,  
Corporations,

Appellant,

v.

CITIZENS TRUST and SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as W. D. NEW-  
ERF RUBBER COMPANY, Bankrupt,

Appellee.

**Citation on Appeal [of Miller Rubber Co. et al.,  
(Original).]**

To the Citizens Trust and Savings Bank, a Corpora-  
tion, as Trustee in Bankruptcy of the Estate of  
W. D. Newerf, Bankrupt:

You are hereby cited and admonished to be and ap-  
pear at a session of the United States Circuit Court  
of Appeals of the Ninth Circuit to be holden in the  
City of San Francisco, in the State of California, on  
the 3d day of January, 1916, pursuant to the Petition  
on Appeal and Assignments of Error filed in the  
clerk's office of the District Court of the United  
States for the Southern District of California, South-  
Division, holding terms in the city of Los Angeles, in  
said District, in the above-entitled proceeding, in  
which The Miller Rubber Company, a corporation,  
and The Miller Rubber Company of California, a cor-

poration, are petitioners and claimants, to show cause, if any there be, why the final decree and judgment rendered in such cause, confirming the order and decree of the special Master disallowing and refusing the claim and petition of said petitioners, for the reclamation of certain goods, wares and merchandise, and the other matters and things, as in said petition on appeal and assignments of error mentioned and set forth, should not be reversed, set aside and corrected; and why speedy justice should not be done to said petitioners in that behalf.

WITNESS the Honorable R. S. BEAN, United States District Judge for the Southern District of California, Southern Division, this 7th day of December, 1915.

R. S. BEAN,  
United States District Judge, Southern District of California, Southern Division.

[Endorsed]: No. 1972.—Bankruptcy. In the United States District Court, Southern District of California, Southern Division. The Miller Rubber Company, Appellant, v. Citizens Trust and Savings Bank, Trustee, Appellee. Citation on Appeal. Filed Dec. 7, 1915. At 30 min, past 4 o'clock P. M. By Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

Received copy this 7th day of Dec. 1915.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Trustee in Bankruptcy.

[2] *In the District Court of the United States,  
Southern District of California, Southern Di-  
vision.*

In re W. D. NEWERF, Bankrupt—No. 1972.

THE MILLER RUBBER COMPANY and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt,

Appellee.

**Stipulation for Transcript [on Appeal of Miller  
Rubber Co., et al.].**

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties herein through their coun-  
sel that the record on appeal herein shall consist of  
the following papers, documents and testimony, and  
none other, and that the clerk in preparing said rec-  
ord, shall omit all captions and verifications.

1. This stipulation for transcript of record on ap-  
peal.
2. Stipulation consenting both appeals in one rec-  
ord.
3. Appellants' amended petition for reclamation,  
excluding schedules of first petition.

4. Answer to petition, it being stipulated that all new matter in the amended petition is deemed denied.
5. Order referring controversy to Special Master.
6. Order of Special Master approving bond.
7. Order of Special Master for delivery of property.
8. Testimony transcribed, and letters copied and attached.
9. Special Master's report in full, except price list [3] of Gibralter tires and price list of Miller tires, and excepting exhibit "B" consisting of two typewritten pages, including contract of 1911 and 1914.
10. Order of Reference in Bankruptcy.
11. Notice to take depositions served July 6th, 1914.
12. Affidavit of W. C. Smith in re depositions.
13. Affidavit of C. R. Wetsel in re depositions.
14. Affidavit of Norman A. Bailie in re depositions.
15. Exceptions to Special Master's report.
16. Judgment of District Court and correction of same.
17. Petition on appeal.
18. Bond on Appeal.
19. Order granting appeal and fixing bond.
20. Citation on appeal.
21. Appellants' objections and assignment of error,
22. Notice of motion to receive depositions in evidence.
23. Order extending time to file transcript.
24. Order allowing transcript on appeal.

25. Certificate of clerk of United States District Court to transcript of record.

IT IS FURTHER STIPULATED that the petition in bankruptcy against said W. D. Newerf was filed March 19th, 1915, and that he was adjudged bankrupt on April 9th, 1915; and that the petition, amended petition of appellants herein, and all other proceedings herein, were filed and had in said bankruptcy of said W. D. Newerf.

Dated at Los Angeles, California, this 5th day of January, 1916.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company.  
THE MILLER RUBBER COMPANY OF  
CALIF.,

Petitioners.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Trustee in Bankruptcy.

[Stipulation that Record on Appeal of Miller Rubber Co. et al. may be Used as Record on Appeal of Citizens Trust & Savings Bank.]

[4] *In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,  
Appellees.

STIPULATION IN RE TRANSCRIPT.

IT IS HEREBY STIPULATED and agreed by and between appellant and appellees in the above-entitled appeal, by their respective counsel, that the transcript on the appeal of Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, Appellants, against Citizens Trust & Savings Bank, a corporation, as trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, Appellee, may be used and serve as and for the transcript on this appeal to the same purpose and with the same effect as if a separate transcript had been filed in this appeal.

Dated December 31, 1915.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Appellees.  
BICKSLER, SMITH & PARKE,  
Attorneys for Appellees. [4]

[5] (Caption.)

**Amended Petition.**

By leave of Court first had and obtained the petitioners herein file their amended petition herein and allege as follows:

**FIRST CAUSE OF ACTION.**

**I.**

The Miller Rubber Company is a corporation organized and existing under the laws of the State of Ohio and a citizen of said State.

**II.**

That the Miller Rubber Company of California is a corporation organized under the laws of the State of California with its principal place of business in the city of San Francisco, California.

**III.**

Your petitioner the Miller Rubber Company represents to the Court that heretofore, to wit, on the 20th day of March, 1915, this Court appointed the Citizens Trust & Savings Bank as receiver of the property of one, W. D. Newerf, trading as the W. D. Newerf Rubber Company. That heretofore, between the 1st day of June, 1914, and the 17th day of March, 1915, both dates inclusive, your petitioner consigned to the Miller Rubber Company of California, W. D.

Newerf, Agent, certain casings, tubes, and tire accessories, of the approximate value of several hundred thousand dollars; that a portion of said goods are now in the possession of said receiver as follows: In the city of Los Angeles, certain goods as described in schedule "A" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$32,101.95; in the city of San Bernardino certain goods as described in schedule "B" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$2,854.00; [6] in the city of San Francisco, certain goods as described in schedule "C" attached to the original petition herein, to which reference is hereby specially made, and which said schedule is hereby adopted, of the aggregate value of \$17,277.05; total valuation of \$52,233.

#### IV.

Your petitioner further shows that in connection with said transactions as aforesaid, your petitioner installed in the places of business at Los Angeles and San Francisco, sets of books of account, consisting of sales-book, ledger, collection reports, sales, order blanks, invoice blanks, letter-heads, envelopes, and other necessary books and papers, belonging to the conduct of said business; that all of said books and papers were paid for by your petitioner and belong to your petitioner. That demand has been made upon the receiver to release and surrender to your petitioner all of said property and that said demand has been refused.

## V.

Your petitioner further shows that it is the unqualified and absolute owner of said property; that the same does not belong to W. D. Newerf, trading and doing business as W. D. Newerf Rubber Company, but that the ownership of said property is as last aforesaid, and not otherwise.

## SECOND CAUSE OF ACTION.

Your petitioners hereby adopt all of the facts and allegations in their first cause of action herein, excepting paragraph V, beginning at line 30, page 2, to and including line 3, page 3, and make the same a part hereof as though fully and entirely set forth at length, and for a second cause of action allege:

## VI.

Your petitioner The Miller Rubber Company of California, a corporation, represents to the Court that each and all of said goods as herein referred to in the first cause of action and in schedules "A," "B" and "C," attached to the original petition, [7] and which are hereby adopted, were shipped by The Miller Rubber Company, a corporation of Ohio, and delivered to your petitioner The Miller Rubber Company of California, a corporation. That possession only is vested in and to your petitioner by said Miller Rubber Company of Ohio with the right of, and for the purpose of the sale of said goods, and the appointing of such agents for the sale of said goods, and that upon the sale of any and all of said described goods, the money so received was to be and was deposited in bank in the city of Los Angeles subject to the order of, and the check of The Miller Rubber

Company of California for the use of The Miller Rubber Company of Ohio only.

### VII.

That your petitioner was at all times in the lawful and rightful possession of each and all of the goods described in schedules "A," "B" and "C," as aforesaid, until dispossessed thereof by the receiver herein.

### VIII.

That under a written contract dated on or about June 11th, 1914, your petitioner constituted and appointed W. D. Newerf, trading and doing business as the W. D. Newerf Rubber Company, its subagent for the sole purpose of selling said goods upon commission upon the terms as set forth in said contract, and in no other way, and that no sale or deliverey of any of said goods described in schedules "A," "B" and "C" aforesaid, was made to the said W. D. Newerf by your petitioner.

### IX.

Your petitioner further represents that under said contract of June 11th, 1914, and since said date, goods were sold by your petitioner's subagent, W. D. Newerf, and delivered to customers by the Miller Rubber Company of California, the accounts receivable for said goods being fully and completely set forth in the books of account of your petitioner opened and kept installed, as more fully set forth in the first cause of action [8] herein, and that said accounts receivable, and said books, are in the possession of the receiver herein.

### X.

That the property and ownership of said accounts

receivable shown as aforesaid, and the money due thereon, was at all times herein alleged, and now is the property of The Miller Rubber Company of California, and said company is entitled to the immediate possession of said books so installed as aforesaid, and the right to collect each and all of the accounts so represented as aforesaid, all of which are now detained and held by the receiver herein, and to your petitioner's great and irreparable disadvantage and loss.

WHEREFORE, (a) your petitioner The Miller Rubber Company of Ohio prays for an order of this Court directing and requiring the Citizens Trust & Savings Bank, receiver herein, to immediately deliver the aforesaid described property to it.

(b) Your petitioner The Miller Rubber Company of California prays for an order of this Court directing and requiring the Citizens' Trust & Savings Bank, receiver herein, to immediately deliver the aforesaid described property to it.

(c) Your petitioner The Miller Rubber Company of California prays for an order directing the Citizens Trust & Savings Bank, receiver herein, to immediately deliver to it each and all of the books of account so installed as aforesaid, and each and all of the accounts and bills receivable of your petitioner as and for its own property.

BICKSLER & SMITH,  
Attorneys for Miller Rubber Co. and Attorneys for  
Miller Rubber Co. of California, Petitioners.

Filed March 31st, 1915, at — min. past 4 P. M.

LYNN HELM,

Referee.

C. MEADE,

Clerk.

[9] United States of America,  
Southern District of California,  
Southern Division,  
County of Los Angeles,—ss

C. R. Wetsel, being by me first duly sworn, on oath says: That he is the credit manager of Miller Rubber Company, a corporation, of Akron, Ohio, petitioner herein, and that he is duly authorized in the premises; that he is the duly authorized, constituted and appointed agent of the Miller Rubber Company of California, a corporation, and duly authorized in the premises; that he has personally made the investigation of the facts set forth in said petition and is more familiar with them than any of the other officers of said petitioners; that the statements and allegations contained in the foregoing petition are true.

C. R. WETSEL.

Subscribed and sworn to before me this 30 day of March, 1915.

[Seal]

W. C. SMITH,

Notary Public, in and for the County of Los Angeles,  
State of California.

[10] (Caption.)

**Answer of Citizens Trust & Savings Bank, Receiver  
To the Petition of Miller Rubber Company.**

Comes now the Citizens Trust & Savings Bank, Receiver in Bankruptcy of the estate of William D. Newerf, Bankrupt, and answering the petition of Miller Rubber Company on file herein, admits, denies and alleges as follows:

**I.**

Said receiver has no information and belief sufficient to enable it to answer the first allegation in said petition, and basing its denial on that ground, denies that the Miller Ruber Company is a corporation organized or existing under the laws of the State of Ohio.

**II.**

Said receiver has no information sufficient to enable it to answer the allegations contained in that part of said petition beginning at line 19 on page 1 thereof, and ending on line 1 of page 2 thereof, and basing its denial on that ground, said receiver denies that between the 1st day of June, 1914, and the 17th day of March, 1915, or at any time or at all, said petitioner consigned to the Miller Rubber Company of California, W. D. Newerf, agent, any casings or tubes or tire accessories, either of the approximate value of several hundred thousand dollars or of any value whatsoever; denies that any portion of said consigned casings are in the possession of said receiver, either in the city of Los Angeles, or San Bernardino, or San Francisco, either as described in schedule "A," or schedule "B," or schedule "C," or other-

wise; denies that any consigned goods of the Miller Rubber Company in the hands of said receiver amount to the sum of Fifty-two Thousand Two Hundred Thirty-three Dollars (\$52,233), or any other sum, or any sum whatsoever.

III.

Answering that portion of said petition commencing on line [11] 2 and ending on line 10 of page of said petition, said receiver alleges that it has no information or belief sufficient to enable it to answer the allegations therein contained, and basing its denial on that ground said receiver denies that in connection with said alleged transactions, or otherwise, or at all, said petitioner installed at any place of business in Los Angeles or San Francisco books of account as described in said petition, or collection reports, or sale order blanks, or invoice blanks, or letter-heads or envelopes, or any other books or papers belonging to the conduct of said business; denies that any of said books or papers, or any books or papers now in the possession of said receiver were paid for by said petitioner or belong to said petitioner.

IV.

Said receiver denies that demand has been made upon it to release or surrender to said petitioner any part of said property.

V.

Answering that part of said petition commencing on line 14 page 2 thereof and ending on line 19 page 2 thereof, said receiver denies on information and belief that said petitioner is the unqualified or absolute owner of said property or any thereof; denies

that said property and the whole thereof does not belong to William D. Newerf, but said receiver alleges on its information and belief that all of the property described in said petition and in the exhibits attached thereto, together with all books of account referred to in said petition and all stationery, letter-heads, etc; are the property of said bankrupt and are rightfully in the possession of said receiver.

WHEREFORE, said receiver prays that said petition may be denied, and that an order may be made and entered herein decreeing that all the property of every kind or nature described in said petition and in the exhibits attached thereto is the property of said William D. Newerf, Bankrupt.

[12]

CITIZENS TRUST & SAVINGS BANK.

By MARK S. SLOSSON,  
Trust Officer.  
Receiver.

Filed March 27, 1915, at —— past 11 A. M.

LYNN HELM,  
Referee,  
C. MEADE,  
Clerk.

W. T. CRAIG,  
DAVE F. SMITH,  
NORMAN A. BAILIE,  
Attorneys for Receiver.

United States of America,  
Southern District of California, Southern Division,  
County of Los Angeles,—ss.

Mark S. Slosson, being duly sworn, says: That he is the trust officer of the Citizens Trust & Savings Bank, receiver herein, and that he verifies this answer for and on behalf of said receiver, in the foregoing entitled proceeding; that he has read the foregoing answer of Citizens Trust & Savings Bank, Receiver, to the petition of Miller Rubber Company and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes to be true.

MARK H. SLOSSON.

Subscribed and sworn to before me this 27th day of March, A D. 1915.

[Seal] J. A. GALVIN,  
Notary Public in and for the County of Los Angeles,  
State of California.

---

[Order Referring Matter to Special Master.]

[13] MINUTE ORDER.

At a stated term, to wit, the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern Division, held at the courtroom thereof in the city of Los Angeles, on Tuesday, the 23d day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Hon. OSCAR A. TRIPPET, District Judge.

No. 1972—BKCY. S. D.

In the Matter of W. D. NEWERF, Bankrupt.

This matter coming to be heard on the petition of the Miller Rubber Company for the delivery of certain property W. S. Bicksler Esq., appearing as counsel for the petitioner; Carroll Allen Esq., appearing as counsel on behalf of the petitioning creditors it is on the Court's own motion ordered that this matter be, and the same hereby is, referred to Lynn Helm, Esq., as Special Master to hear and determine the issues raised by said petition and such answer as may be filed in reply thereto and to report his findings of fact and conclusions of law to the Court.

[14] (Caption.)

**Order Approving Bond, etc.**

The Miller Rubber Company of California, having filed a bond in the sum of \$20,000 with the American Surety Company of New York, as surety, conditioned as provided in the order entered herein on the 6th day of April, 1915.

It is ORDERED that said bond and the same is hereby approved, and

IT IS ORDERED that the receiver comply in all respects with the order of April 6, 1915.

LINN HELM,

Referee in Bankruptcy, Special Master.

April 7, 1915.

[15] (Caption.)

**Order [of Referee in Bankruptcy] on Petition of  
Miller Rubber Company.**

This cause coming on to be heard upon the order heretofore entered in said court on the 29th day of March, 1915, appointing Lynn Helm, Referee in Bankruptcy, Special Master, to hear the petition of the Miller Rubber Company of Ohio, to reclaim certain goods in the possession of the receiver herein, and an answer having been filed by the receiver, Messrs. Bicksler & Smith appearing for the Miller Rubber Company of Ohio, and Norman Bailey, Esq., Dave F. Smith, Esq., and W. T. Craig, Esq., appearing for the receiver, upon motion of the Miller Rubber Company of Ohio leave is given to file an amended petition joining in said petition the Miller Rubber Company of California, as petitioner, with the Miller Rubber Company of Ohio, the answer of the receiver heretofore filed to the petition of the Miller Rubber Company of Ohio, to stand as an answer to this amended petition, all matters not therein admitted to be considered denied.

And thereupon, the Court having partially heard the evidence offered on behalf of the petitioners, and it appearing that the hearing hereon could not be concluded at the present time because of the necessity of taking an account of all transactions between the Miller Rubber Company of Ohio and said bankrupt, and the Miller Rubber Company of California and said bankrupt, but that it was desirable that the goods sought to be reclaimed should be, if possible,

delivered to the petitioners, the Miller Rubber Company of California, subject to certain conditions, the Court having heard the argument of counsel and being fully advised in the premises finds from the testimony and the exhibits that have heretofore been offered herein that a contract was entered into between W. D. Newerf and the Miller Rubber Company of Ohio in November, 1911, which may be known as a consignment contract, under which goods were consigned [16] or sold, as may hereafter be determined, by the Miller Rubber Company of California, to Newerf. Subsequently, a contract was entered into between W. D. Newerf and the Miller Rubber Company of California, which is dated June 11, 1914, but was entered into some time subsequent to the 28th day of August, 1914, by which the Miller Rubber Company of California appointed W. D. Newerf as its agent to sell, in certain territory therein described upon a commission basis, the matters under the contract relating to the date as of July 1, 1914.

Newerf was indebted to the Miller Rubber Company of Ohio, under the contract of November, 1911, and had given notes for such indebtedness; he also, on the first of July, had a stock on hand held under the contract of November, 1911. Subsequent to July 1, 1911, Newerf, as agent of the Miller Rubber Company of California, sold goods from which he was entitled to commission according to the contract dated June 11, 1914. These commissions were, by specific authority of Newerf given about November 16, 1914, applied upon the indebtedness of Newerf to

the Miller Rubber Company of Ohio; since then, the application, if any, has been made without Newerf's consent.

A dispute has arisen between the Miller Rubber Company of California and Newerf as to the amount of the commissions which Newerf should be entitled to, and according to the theory of the auditor of the Miller Company of California, they should not exceed \$12,217.84. On the other hand, Mr. Newerf claims that they should be from eighteen to twenty thousand dollars. It is necessary that an accounting should be taken between the California Company and W. D. Newerf, agent, as to the amount of stock on hand, and the amount of commissions due Newerf, either on account of goods sold and stock for which collections have been made, or goods sold for which remittances are still due. It is therefore ordered that an accounting be taken by the Mushet Audit Company, and these accounts as shown by the books of the Miller [17] Rubber Company of California, kept by W. D. Newerf, Agent. The auditor will take the statements of Mr. Wetsel, the auditor of the Miller Rubber Company of California, and also the statement of Mr. Newerf and Mr. Roe, the bookkeeper of the W. D. Newerf Company as to their methods of making their respective accounts. If they disagree, the auditor will report the several amounts that the accounts may show upon either theory, either that of Mr. Wetzel or that of Mr. Newerf, or his bookkeeper. The audit company will make a complete audit of the books and as soon as the audit is completed will turn the same over to the

Miller Rubber Company of California, but said books to remain in this jurisdiction until the further order of this Court.

An invoice will be taken of goods on hand, received since July 1, 1914, by W. D. Newerf, Agent, from the Miller Rubber Company of California, and they, and all uncollected accounts will be turned over to the Miller Rubber Company of California, upon the Miller Rubber Company of California executing a bond to the receiver in this case in the penal sum of twenty thousand dollars, conditioned that the Miller Rubber Company of California, will, on the termination of the accounting, pay to the receiver or trustee, any moneys that may be found due from the Miller Rubber Company of California to W. D. Newerf, Agent, on account of the commissions on goods consigned to him from the Miller Rubber Company of California. And further conditioned for the payment on demand of such portion of any commissions that may be due W. D. Newerf, or W. D. Newerf, bankrupt, on account of collections from sales of said goods heretofore consigned by the Miller Rubber Company of California to W. D. Newerf, Agent, whether upon subconsigned goods, or goods actually sold, as such collections may be made by the Miller Rubber Company of California; and upon agreement of the petitioner in this case, the Miller Rubber Company of California and the Miller Rubber Company of Ohio, to pay any costs that may be ultimately awarded against them.

[18] If a bond is not given in accordance with this order, the goods on hand will remain until the

final determination of the audit. The audit company shall allow the representative of the Miller Rubber Company of California access to the books at all times, not interfering with said audit.

An account shall also be taken by the audit company of all goods consigned by the Miller Rubber Company of Ohio to W. D. Newerf prior to July 1, 1914, and on hand at that date, and in the sale of said goods on hand July 1, 1914, and on hand and held by the receiver or trustee, a separate account of the sales thereof shall be kept. The fund derived therefrom to be subject to the final determination of this court as to whether the same belongs to W. D. Newerf, bankrupt, or the Miller Rubber Company of Ohio, and any collections of back accounts from sales made of consigned goods last aforesaid, shall be kept separate and distinct from collections from other goods of said bankrupt.

The audit company will also report separately and distinctly in reference to the accessories consigned under the contract of June 11, 1914, and as to the method in which they were handled by the California Company and W. D. Newerf, agent.

The bonding company must agree that if the money is not paid by the Miller Rubber Company of California within thirty (30) days after the final award shall be made against the rubber company, that a judgment may be entered for that amount against the bonding company.

**AND IT IS FURTHER ORDERED** that the hearing on said petitions shall be continued until the

coming in of said account.

LYNN HELM,  
Referee in Bankruptcy.

April 6, 1915.

**CERTIFICATE ATTACHED.**

United States of America,  
Southern District of California,  
Southern Division,—ss.

I, Lynn Helm, Referee in Bankruptcy, in and for the county [19] of Los Angeles, State of California, in and for said district, do hereby certify that the foregoing is a true and perfect copy of order approving bond and order on petition of Miller Rubber Company, in re W. D. Newerf, Bankrupt, in the above-entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of April, 1915.

LYNN HELM,  
Referee in Bankruptcy and Special Master.

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**[Testimony of W. D. Newerf.]**

[20] W. D. NEWERF testified as follows:

"I first commenced to do business with The Miller Rubber Company about November, 1911, as I remember it, in the capacity of agent for their tire line. I had an agreement with The Miller Rubber Company dated November 6th, 1911.

I made a subsequent contract dated June 11th, 1914, with The Miller Rubber Company of Califor-

nia, which is part of the record, and which bears my signature.

Q. At the time this contract was entered into did you have on hand any goods consigned under the other contract to which you refer as having been executed in 1911—any of the goods of The Miller Rubber Company?

Mr. BAILIE.—That is objected to as calling for an opinion and moreover it assumes a fact not in evidence because it assumes that that contract was actually entered into, and that it binds the parties hereto; this alleged contract which Mr. Newerf has in his hand, that is, Petitioner's Exhibit "A," or whatever it is, is not a contract.

SPECIAL MASTER.—I understand the point but the question practically is this: Prior to the 11th day of June, not with reference to any contract at all, but prior to the 11th day of June, did they have any goods in their hands that were consigned to them pursuant to the contract of November 6th, 1911?

Mr. BAILIE.—You use the word consigned in its general meaning?

SPECIAL MASTER.—Yes, as under that contract.

Mr. BICKSLER.—Under that contract?

Ans. Yes, sir.

[21] "All of the goods received were billed in this manner, The Miller Rubber Company of California, although it came from Akron, Ohio. I didn't, that I know of, receive any goods in any other way except as shown by this statement."

Referring to paragraph VII of the contract of No-

vember 6th, 1911, said paragraph quoted in the question reads as follows:

“When desired by second party, four months’ notes drawing interest at 5% will be accepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed Twenty-five Thousand Dollars (\$25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than Twenty-five Thousand Dollars (\$25,000) unless credit of second party becomes impaired.”

Q. Now, please state to the Court whether any notes were made or given, and what, if anything, was done in that connection between you and The Miller Rubber Company of California.

Ans. There were notes and cash given in settlement of the billing of The Miller Rubber Company to the Newerf Company.

The custom was to check the amount of goods sold.

Goods were sold during the month to various customers, and the amount was figured at the end of the month, and a statement was sent to The Miller Rubber Company for the Miller goods, and the sales were made from the consigned stock of The Miller Rubber Company.

I first had a consultation with Mr. Wetsel representing The Miller Rubber Company of California, with reference to entering into a new contract, I

would say in the forepart of June, 1914, representing, as I understand, The Miller Rubber Company of California and The Miller Rubber Company, of Ohio.

[22] I understood him to be the credit man of The Miller Rubber Company of Ohio.

I dealt with him then as a man representing The Miller Rubber Company, of Ohio.

I understand that The Miller Rubber Company, of Ohio, had established this as a corporation known as The Miller Rubber Company of California for the purpose, possibly, of being used, or of using it to facilitate their business as a California corporation.

It was to be under the laws of the State was the reason for it.

Mr. Wetsel explained to me that so far as being a separate corporation it was just the same corporation. Only organized in that way to comply with the laws of this State.

Referring to letter of August 13th, 1914, which is part of the record, it was not written to The Miller Rubber Company of California because we understood we were dealing with The Miller Rubber Company, of Akron, Ohio.

I figured that this new way of carrying my account would enable me to get more goods, that is one reason.

I received invoices of the goods from The Miller Rubber Company, of Ohio, marked Miller Rubber Company of California, since the first of July, 1914. Prior to that date they were not, to my knowledge, so marked. After that date they began to be

marked Miller Rubber Company of California. After that date I made no change in my system of books. I still kept my stock cards just the same. On the 1st of August, 1914, I put in a new system entirely, a shorter system, but it was carried on in the same way as it had been heretofore. The cards show the casings and tubes on hand the first of July, 1914, and as new goods came in they were put on the cards as they came in.

[23] The invoices came from Akron, Ohio.

The invoices were marked "The Miller Rubber Company of California," but they came from Akron, Ohio.

Referring to the statement on the stock card above referred to it contains the words "Consigned to W. D. Newerf Rubber Company, Los Angeles."

Referring to the contract of November 6th, 1911, I never gave to The Miller Rubber Company, of Ohio, a ninety days' notice of my election to terminate that contract. I never received from either The Miller Rubber Company, of Ohio, or the Prudential Rubber Company, a like notice of the termination of said contract.

I had full charge of selling the Miller goods in my store. There was no representative of The Miller Rubber Company of California in my establishment, and there was no representative of The Miller Rubber Company, of Ohio, in my establishment. All of the employees in my establishment were on my payroll and on nobody else's payroll.

I did not consult The Miller Rubber Company of California, or The Miller Rubber Company, of Ohio,

with regard to extending credit, or what credit I should extend.

If I wanted to subconsign goods I subconsigned them.

There was a new arrangement entered into July 1st, 1914, when I opened up a separate set of books in my office to keep track of the Miller goods, to wit, the contract dated June 11th, 1914, and its supplement.

I had no sign in my store to indicate to the general public that anything there was the property of The Miller Rubber Company of California.

[24] I never owed The Miller Rubber Company of California any money, not to my knowledge. (Objected to as incompetent, irrelevant and immaterial.)

We entered into a new arrangement with The Miller Rubber Company of California as of July 1st, 1914, and earned commissions from that date on. Prior to that date we were dealing directly with The Miller Rubber Company, of Akron, Ohio, and did owe them for goods purchased. (Objected to as calling for a conclusion of the witness.)

The Miller Rubber Company of California has never paid me any money on account of commissions.

My interpretation of the contract with The Miller Rubber Company of California was to the effect that the computation of the compensation was to be, at the time of the contract being made, 10—12½—12½—5% from the list attached to the contract, and that the difference between the sale price of a tire or

tube and those figures, was to be our compensation, and our conclusion of the sale price was the face of the invoice. If a tire is sold at \$20.00, it is 10—12½—12½—5% from the list price, or from the price list attached to the contract. Our compensation should be the difference between the original price stipulated in the contract, and the face of the invoice. The 5% appearing on the invoice as terms was a matter, we concluded, of The Miller Rubber Company's making, and that that was simply an inducement for the customer to pay the cash on that invoice at a stipulated time, and should not enter into our compensation.

The forms of invoices were furnished by The Miller Rubber Company of California.

There was no reference to the 5% except in the place on the invoice where it said terms. It said 5% 10th Prox. We considered that that was allowed by The Miller Rubber Company of California.

[25] There was a period of time that there was no objections made by The Miller Rubber Company to our method of figuring, and I was then figuring as I have indicated on a sale for \$100. (Objection sustained by Special Master and answered subject to the objection.) It was understood between The Miller Rubber Company and ourselves that when a tire was sold at list price, the customer's list, and billed in that manner, there was no 5% allowed. It was also understood that when a tire was sold at the dealer's list price the 5% would be allowed. That was proven by the acceptance of the invoices by The Miller Rubber Company."

(Move to strike out, is not responsive to any question, incompetent, irrelevant and immaterial, and a conclusion of the witness. Special Master ruled he would sustain subject to the motion.)

[26] The following night letter was introduced:  
[Exhibit—Night Letter, September 10, 1914, W. D.

**Newerf Rubber Co. to Miller Rubber Co.]**

Letter-head Western Union Telegraph Company.  
NIGHT LETTER.

Los Angeles, Cal., 9-10-14.

The Miller Rubber Company,  
Akron, Ohio.

Replying to Wetsel letter fifth, reference note due fifteenth, we have made superhuman effors trying every possible means to raise funds to meet this, but Coast financial conditions are such that it is beyond our power to raise money immedately. We are endeavoring to raise money and have application now under advertisement. Clear judgment on your part should show your only course is to eredit note with approximately six thousand dollars which our books show July and August commissions to be, and renew balance for ninety days, giving us a chance to raise money. Wire back these instructions as we positively cannot pay note any other way. Your intimation of bringing matters to a climax might raise more havoc than you can cenceive.

W. D. NEWERF RUBBER COMPANY.

[27] The following telegram was introduced:

[Exhibit—Day Letter, November 12, 1914, W. D. Newerf Rubber Co. to Miller Rubber Co.]

Letter-head Western Union Telegraph Company.

DAY LETTER.

Los Angeles, 11-12-14.

The Miller Rubber Company,  
Akron, Ohio.

New notes mailed per your request. Agreeable to apply our commissions on open account. Return to us all notes for which we have sent renewals. Writing.

W.D. NEWERF RUBBER CO.

[Testimony of John F. Roe.]

[28] JOHN F. ROE, bookkeeper for W. D. Newerf Rubber Company testified as follows:

Newerf Rubber Company had one store situated at the corner of Pico and Hope Streets, Los Angeles. It was divided into three rooms.

It was all occupied by the Newerf Rubber Company.

In these three apartments were kept tires and accessories. They were kept in different departments. The corner room was the salesroom. Adjoining that on the Hope Street side was the tire room, and adjoining the salesroom on the Pico Street side was the stock and shipping room.

In the tire room there were tires and some other goods, accessories, mainly tires.

The tires were impressed with the name of The Miller Rubber Company, and the size and description and serial number of the tires.

There were no signs hanging up in the room where the Miller goods were stored to indicate that they were the property of The Miller Rubber Company, of Ohio, or The Miller Rubber Company of California, but there was a tag on the tires showing the grade of tires, the serial number, the size and the style of the goods. It said something about The Miller Rubber Company. I could not tell you off-hand just what the wording on that tag was.

The tire room, aside from the fact that it had tires stored in it did not differ in any way from the other rooms of the store. One room was a sales-room, and the other room was a shipping room, and the other room had tires [29] and accessories about it, that is all there was to it.

A stranger coming into the room, or coming into the store, could not distinguish part of the stock from the other except that part was tires and accessories, and the other part was the shipping room.

No stranger coming in would notice any difference. There was nothing to indicate that the goods belonged to anybody except the W. D. Newerf Rubber Company.

[Testimony of Charles R. Wetsel.]

[30] CHARLES R. WETSEL, Credit Manager of The Miller Rubber Company of California, testified as follows:

The California corporation (The Miller Rubber Company of California) was not devised as a profit making corporation. It was devised specially for the purpose of complying with the Statute of the

(Testimony of W. D. Newerf.)

State of California, as I understand it.

In reference to certain notes executed by W. D. Newerf Rubber Company in favor of The Miller Rubber Company, of Akron, Ohio, amounting to \$26,561.62. These notes represent the indebtedness which was owing to The Miller Rubber Company, of Ohio, by the W. D. Newerf Rubber Company prior to July 1st, 1914, or renewals of other notes which we had.

They were renewed as of the date shown by the note.

They were renewals of other notes.

There were certain notes given to cover the indebtedness from month to month, and as those notes fell due in October, November and December, certain renewals were offered.

The accessories were never charged direct to the customers by Mr. Newerf on the books of The Miller Rubber Company of California, the way the tires and tubes were. The goods were sold out of consigned stock and there were so many small items to keep reporting for a small portion of the business anyway, and Newerf did not want to hire what he considered would be an additional clerical force to run the business and take the stuff out under the name of The Miller Rubber Company of California, so of his own accord he takes and keeps the records of these sales, and I do not know how [31] he charged them. I assume he charged them, takes all of the stuff out of our consigned stock regardless of our directions, and makes a list of those sold at the

(Testimony of W. D. Newerf.)

end of the month and charges it to us on our stationery.

We take the figures which are furnished The Miller Rubber Company by Newerf and compute the commissions on those figures, the commissions being the actual difference between the actual selling price for which Newerf sold our goods, and the prices that are contained in the contract. If Mr. Newerf sells \$100 worth of goods, so far as trade discount goes we allow 5% off for cash, he giving the purchaser the option of paying the bill within a certain specified period and deducting the 5% cash. Mr. Newerf's contract is such that he would only be entitled to a compensation which is the difference between the actual selling price and the figure named in the contract. The actual selling price is \$100 less the 5%, so that it is \$95 that is used as the actual selling price instead of \$100. Those invoices are billed by Newerf himself on that basis. We take off the 10—12½—12½—5% off the list price.

The 10—12½—12½—5% is figured off that list price and the difference between the 10—12½—12½—5% from the list represents Newerf's compensation for handling the goods, then he would actually only get \$95 for the goods. Suppose you go to Newerf to buy a tire. He knows your credit is good and renders you a bill for \$100 worth of tires, but he gives you terms of 5% tenth prox., which means that the actual selling price of the goods is \$95. Then he sends a copy of that invoice in to The Miller Rubber Company and [32] The Miller Rubber Company

(Testimony of W. D. Newerf.)

take that copy of the invoice and they determine the basic price, 10—12½—12½—5% off \$100, is a certain amount, and deducting that certain amount from this \$95 is what he gets for his commission.

The main purpose of giving the 5% is to aid in the collection of accounts to get the money in quicker, and that is the only reason that the 5% is given, to get the collections in.

It is optional with the agent as to what he sells goods for. He does not even have to use our list. He could charge twice the prices if he wanted to. He is not to make the price below a certain point, and he can sell for as much in excess of that as he desires. That means that he cannot go below 10—12½—12½—5% below the list price, that is the minimum, and he can sell as much above that as he desires.

[Testimony of William F. Pfeiffer.]

[33] WILLIAM F. PFEIFFER testified as follows:

I am secretary and assistant treasurer and general manager of The Miller Rubber Company, of Ohio.

I am secretary of The Miller Rubber Company of California.

The Miller Rubber Company of California gets its goods and merchandise, that it sells, from The Miller Rubber Company, of Ohio.

The goods are shipped on the order of such merchandise as is required to take care of the demand—it is based on sales—and the payments, I think, are

(Testimony of William F. Pfeiffer.)

deposited and drawn on later by The Miller Rubber Company, of Ohio.

The Miller Rubber Company of California was organized because we understood that a gentleman named Miller, who had retired from business, was coming to the Coast to organize a company to manufacture tires. We had expended considerable money here in establishing our sundries business under the name of The Miller Rubber Company. This was a Mr. W. B. Miller who came out here, and he was after some of our organization to come out here and take charge of the factory under the name of The Miller Rubber Company, so we incorporated to protect ourselves against the trade that was established here—the competition.

I know all of this because he attempted to employ some of our expert men for the purpose of coming out here.

All goods were shipped by The Miller Rubber Company to The Miller Rubber Company of California.

**[34]** The credit department is a part of the treasury department, and they were instructed by the treasurer and myself, as general manager, to safeguard the funds of The Miller Rubber Company, of Ohio, and the funds were—our records show it, I am not positive—I think the money was all collected here and the checks drawn payable to The Miller Rubber Company of California for all funds payable to The Miller Rubber Company, of Ohio.

The California Company had no possession of the

(Testimony of William F. Pfeiffer.)

property, merely acting as agent for The Miller Rubber Company, of Ohio, and those officers in California—we had two officers in California, were employed by The Miller Rubber Company, of Ohio, and received their pay from The Miller Rubber Company, of Ohio; all payments were made by The Miller Rubber Company. (Upon motion the latter part of the answer was stricken out, and the evidence stood subject to the motion.)

There were no books upon which we made any charge for goods shipped to the California Company from Ohio. They are two separate corporations, to wit, The Miller Rubber Company and The Miller Rubber Company of California, and the officers of the two corporations are not identical, the personnel is almost the same. Jacob Pfeiffer, President of both companies; F. B. Theiss, treasurer of both companies; myself (William F. Pfeiffer), secretary and general manager of both companies.

The Miller Rubber Company of California has five officers, two reside in California.

Five people were organizers of The Miller Rubber Company of California and signed the articles of incorporation.

[35] We did not have a separate set of books for The Miller Rubber Company of California in California, to my knowledge.

..The Miller Rubber Company, of Ohio, does not keep an account on its books for The Miller Rubber Company of California—not exceeding as a memorandum. It is a memorandum slip. The account of

The Miller Rubber Company of California appears on the books of The Miller Rubber Company, of Ohio, no more than a memorandum. It is simply to know where the goods are that belong to The Miller Rubber Company, of Ohio.

The books of The Miller Rubber Company, of Ohio, show if there was some money deposited here by The Miller Rubber Company of California to the account of The Miller Rubber Company, of Ohio, because our depositors send us duplicates of the deposit slips in the depositary here.

Checks were drawn on the account which was kept in Los Angeles by The Miller Rubber Company of California. It checked out all of the account and I signed the checks as an officer of The Miller Rubber Company of California.

The Miller Rubber Company of California maintained its separate organization here in California to comply with the law.

They kept a minute-book.

All of the property that was deposited with The Miller Rubber Company of California belonged to The Miller Rubber Company of Ohio. That is true as to the money also.

#### [Testimony of C. B. Conlee.]

[36] Mr. C. B. CONLEE, employed by Mr. Wetsel, Manager of The Miller Rubber Company of California, and credit manager of The Miller Rubber Company, of Ohio, who had been an employee of W. D. Newerf Rubber Company for two years prior to

(Testimony of C. B. Conlee.)

the filing of the petition of bankruptcy, testified as follows:

There were other goods stored in the same room with the Miller stock on the north side of Hope Street. They were not supposed to be but they were.

There were signs up there with The Miller Rubber Company's name on them.

There are also certain goods, of those same goods that have been reconsigned to various people.

Mr. Bailie, of counsel for the trustee herein upon cross-examination of W. D. Newerf, the bankrupt in reference to the amount, if any, which might be due from him to The Miller Rubber Company (objected to by Mr. Smith, one of counsel for The Miller Rubber Company, as being incompetent, irrelevant and immaterial), stated:

“We are not trying that now.”

### [37] **Objections to Report of Audit Company.**

We object to this report:

First, as to the computation of commissions in that in the recapitulation he has used Mr. Newerf's ideas on commissions in making the recapitulation.

Second, we object to the report and the statement therein of \$269.98 should be repaid as a preference, there being no evidence of its being a preference.

Third, we object to the report in that it does not show that commissions due to Newerf were credited on the amount owing by Mr. Newerf to the Miller Rubber Company.

### [38] **A price list was furnished by The Miller**

Rubber Company to W. D. Newerf, and by The Miller Rubber Company of California to W. D. Newerf, Agent, under the contract of June 11th, 1914, which states, after giving the prices at which tires are to be sold, "Terms 5% cash ten days."

[**Receiver's Exhibit No. 1—Letter, June 24, 1914.]**

[39] (Letter-head.)

Akron, Ohio, June 24th, 1914.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

You will please be advised that the writer has gone over the figures which were drawn up while with you as also contract and the matter will be fully submitted to you shortly.

We have to-day wired you that stationery will be expressed to you to-morrow, thus permitting your starting on our new proposition commencing July 1st.

We wish to confirm, however, the conversation which we had with you on some of the points which were brought up for discussion, and which are not covered by the contract.

Title on Consigned Stock.

Under the new arrangement we would suggest that you have typewritten or stamped with a rubber stamp on the bills of your subconsignments the fact that any stock which is billed out on memorandum only that the title remains with the Miller Rubber Company of California. We understood it has been customary for you to bill these out with prices extended

which, to our minds, should be safeguarded.

#### Insurance on subconsignment stocks.

On all new contracts covering consigned stock you will please insert the paragraph which the writer suggested with reference to our charging subconsignments through *pro rata* share of insurance. We carry a floating insurance policy and shall be very glad to make charges to you covering this insurance for your subconsignments at periods of three months.

#### Old Stock.

Please have someone look over the stock monthly who understands the needs of your business thoroughly, and who can thus intelligently eliminate any tires which are bound to remain with you for an indefinite period. We want to keep your stock [40] as new as possible and also this gives us an opportunity to dispose of tires elsewhere which you find it impossible to sell and might eliminate a considerable *loos* to us.

#### Schedule of tires.

The schedule which your Mr. Sahland submitted to the writer has been referred to Mr. White, who has charge of our consignment department, and you will undoubtedly hear from us very shortly with reference to this list.

Kindly note that you have promised to make your reports as promptly after the 25th as is possible. Kindly do this.

#### Adjustments.

Please be advised that Mr. Newerf has consented to our arranging that in the future all adjustments shall be net, and that the only compensation to you

is the ten per cent (10%) commission which shall be forthcoming with your commission statement.

Also kindly note the suggestion which the writer made that you have someone check over your inventory occasionally who is not in the custom of so doing. This may show up some discrepancies in your stock which otherwise would remain unknown for a long period of time.

Yours very truly,

THE MILLER RUBBER COMPANY OF CAL.  
CRW—GD. Credit Department.

Filed. U. S. District Court. No. 1972. Receiver's Exhibit No. 1. March 30th, 1915. Helm, Referee.

[**Receiver's Exhibit No. 2—Letter , July 23, 1914.]**

[41] (Letter-head.)

Akron, Ohio, July 23d, 1914.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

The writer has been obliged to refrain from mailing the contracts back which he brought from Los Angeles duly signed by Mr. W. D. Newerf due to the fact that in going over the situation with the different departments at the factory they have felt that there were some changes necessary.

Conditions have changed quite materially even since the making of our agreement with you last July, and in view of the misunderstanding which we had and have had for the last year it has been a matter

of considerable application on our part to draw up the contract which is satisfactory to everyone concerned. We believe, however, that we have accomplished this and we return herewith a new contract and supplement in duplicate for your signature. Also accompanying the same is the original and duplicate contract signed by W. D. Newerf under date of June 11th.

The purpose of the contract which we have drawn up is similar to the purpose of the contracts of June 11th, and which we return herewith for cancellation. There is one thing we believe which we have been successful in doing, and that is that you will find the prices on accessories and repair materials are a little lower, the discount being larger. These prices are applicable to business from July 1st, only. Please bear this in mind.

A number of changes in the contract are made simply with the idea in mind of making the interpretation of the contract easier, and we urge that you go over the matters seriously, sign and return to us without delay. We are very much interested in lining the Coast proposition up properly at the earliest possible moment, but for some reason or other we seem to be subjected to delays more or less. If we can have your co-operation in this matter it will assist materially in reaching the desired result.

[42] You will also find enclosed proposal for credit insurance contract which the writer agreed to look into upon his return. The loss which you would be obliged to sustain prior to participating in this policy is a little more than we believed originally, being

\$3,000, but you are guaranteed against loss for \$5,000 as a total. There are several limitations of this contract which should be considered by you in determining whether or not it is going to meet your requirements.

The first in line A-1 which follows line 13 as also A-2 immediately following. The explanation of these two lines is that the limit of any one account shall be 20% of his lowest capital rating, and not exceeding \$2,500 gross, all ratings being based on the Dun book. You will notice from the flier attached that it specifies what percentage of loss the Insurance Company stands if the debtor has certain ratings. That in certain instances they stand  $66\frac{2}{3}\%$  of the gross loss, no limit to be more than \$250 and where the rating is blank and the capital blank the percentage that each shall sustain as a loss is the same  $66\frac{2}{3}\%$ ; that with unmentioned or professional customers there shall be a single limit of \$250 and the Insurance Company will stand 50% of any loss sustained by you.

Now the question uppermost in the writer's mind is whether or not the greater percentage of your customers are rated. We believe they are, as our impression is that you are doing a wholesale business largely. If we are correct, do the larger percentage of your customers have pretty fair ratings? Not having a detailed knowledge of your business, it is a mighty hard question for us to conclude whether or not this policy is going to benefit you to any extent. You are covered, understand, for the premium aforementioned limitation of maximum loss under the policy being \$5,000.

[43] Please understand that if your losses totalled \$8,000 in the year you would have to lose originally \$3,000 and the balance would be covered by the insurance policy.

Now, this premium rate can be reduced as also the initial cost of \$3,000 by your furnishing the Insurance Company with a statement of your losses for the past three or four years and the percentage of such losses to total sales. The writer is unable to give the Insurance Company this data and they arbitrarily made the premium on the basis of two per cent (2%) with an initial loss of \$3,000, these figures of course not being worked out in any particularly scientific manner.

We shall be very glad to have your full response in reference to this at your early convenience and hope that you will accompany the contracts with information bearing on this subject.

Also please advise us what has been done about the Bond which J. B. Newerf & Son wrote and are holding for our contract.

Yours very truly,  
THE MILLER RUBBER COMPANY OF CAL.  
CRW—GD. Credit Dep't.

U. S. District Court. No. 1972. Receiver's Exhibit No. 2. Filed March 30th, 1915. Helm, Referee.

[**Receiver's Exhibit No. 3—Letter, August 13, 1914.**]

[44] (Carbon Copy.)

Los Angeles, California. August 13th, 1914.

Miller Rubber Company,

Akron, Ohio.

Gentlemen:

In accordance with your request, we have signed contracts recently received but have added to contract clause reading as follows: ("Party of the first part agrees to allow one-half of the expenses of W. D. Newerf or his Manager, to the factory at Akron, Ohio, for at least once a year during the life of this contract.") This you have neglected to include in the last contract you have submitted, evidently an oversight. Therefore, we are making it a part of the contract and have signed same with this understanding.

You appear to be in very much of a hurry to get this contract back, and probably have overlooked the fact that you were over a month in returning the contract to us after same had been closed and signed as we supposed on June 11th. However, same has been executed and sent to you as above.

We trust now, with the final execution of this contract, that there will be no cause for any further misunderstandings and that the Miller Rubber Company, Akron, Ohio, will appreciate the necessity of co-operating fully with the Miller Rubber Company of California, W. D. Newerf, Agent, and further appreciate the necessity of shipping goods to the Miller

Rubber Company of California. This seems to be a worn-out subject, but nevertheless a decidedly important one and at this writing we are in as bad a shape as ever we were in having stock to supply our daily demands.

It is very evident that your consignment department is not familiar with conditions as they exist here in this territory. [45] They do not seem to take into consideration distances, time and the question of subconsignments. They seem to glance at a card record that you may have that is always old and conclude that The Miller Rubber Company of California has a large stock on hand, and do not take into consideration that we are subject and are receiving orders daily in Los Angeles and in San Francisco for tires and tubes for immediate delivery.

Some of our subconsignments are three hundred and four hundred miles distant from this point, Los Angeles. Therefore, you can readily appreciate how impossible it would be to get a tire from that distance to be delivered in fifteen minutes.

Mr. Wetsel should be entirely familiar with this condition as he was here on the ground and these matters were called to his attention. Should Mr. Millhoff or Mr. Pfeiffer ever be able to come out here they in turn would see the conditions as they exist.

I understand that you feel that the \$60,000.00 stock is a large one for this Western territory. I wonder what you will say when I tell you that the B. F. Goodrich Company carry in Los Angeles alone a \$375,000 stock of tires and undoubtedly an equal amount in

San Francisco. This you see makes the Miller proposition look like a two cent piece as a matter of comparison.

Furthermore Miller with its high-priced tire on the recent advance raised fifteen per cent while Goodrich with its low-priced tires raised twelve and one-half per cent. You must understand that all these things effect volume of business. Mr. Millhoff as General Sales Manager of the Miller Rubber Company is undoubtedly interested in increasing volume of business. He should appreciate the fact of the impossibility of increasing volume of business on the Pacific Coast on the limited stock of goods that you give us to do business with. As before stated we do not like or wish to criticize or complain, it is farthest [46] from our minds to do so, but we do wish to impress upon you if possible the existing situation and the absolute necessity of your furnishing us a sufficient stock of goods to do business with that the territory demands and prices and discounts that are at least reasonable.

Upon the writer's return from out of the city he finds that you have been complaining by telegram and letter of our not having sent reports to you promptly. This we must take exception to for the reason that since the first of July when our new deal went into effect we have forwarded to you daily and promptly duplicate invoices and credit memorandums of each transaction that has taken place. We did not understand that we are to send you reports in addition to these duplicate invoices and we also understand that the duplicate invoices that you receive

daily give you complete information of what business is done, therefore, we fail to understand how you refer to us delaying sending you reports.

The question of inventory we have answered you in a former letter which is self-explanatory.

We received advice the other day that by your Texas Agent going to Akron he was able to get several carload shipments of tires which they were very much in need of for their territory. This probably accounts in a degree for our not getting any tires. It is a pretty hard proposition for us to jump from Los Angeles or San Francisco to Akron to get deliveries as it is a long trip and an expensive one and certainly should be unnecessary. However, judging from the experience of your Texas Agent it is necessary to get results.

Will you kindly acknowledge receipt of this letter and advise us what you can do for us.

Yours very truly,  
W. D. NEWERF RUBBER CO.

per \_\_\_\_\_.

WDN—LC.

No. 1972. U. S. District Court. Receiver's Exhibit No. 3. Filed March 30th, 1915. Helm, Referee.

[**Receiver's Exhibit—Letter, August 22, 1914.**]

[47] (Letter-head.)

Akron, Ohio. August 22d, 1914.

W. D. Newerf Rubber Co.,  
Los Angeles, California.

Gentlemen:

Your contracts were duly received and submitted with one addition thereto. Accept our thanks for same.

Permit us, however, to call your attention to the fact that we wrote you quite fully with reference to the manner in which security is required by us so to be given. You have not responded but we should like a reply by return mail as to whether or not it is your intention to furnish us with a personal security bond or if it is preferable to take out credit insurance.

We enclose such a bond as we require and immediately upon receipt of your reply we will advise you as to our decision in this respect.

Yours very truly,

THE MILLER RUBBER COMPANY OF CALIF.

CRW—GD.

Credit Dept.

U. S. District Court. No. 1972. Receiver's Exhibit. March 30th, 1915. Helm, Referee.

**[Receiver's Exhibit No. 5—Letter, August 28, 1914.]**

[48] (Carbon Copy.)

Los Angeles, Cal. August 28th, 1914.

Miller Rubber Co.,

Akron, Ohio.

Attention Credit Department.

Gentlemen:

In reply to your letter of August 22d will say that we note you have received contracts properly executed and which you have acknowledged. How is it you do not return one of the copies to us.

Relative to the bond of which you enclose a form. The reason that we have made no effort in this direction was because it was our understanding that you were going to attend to this matter yourself with the credit insurance matter. However, if you prefer

the bond we will again take the matter up with the bonding company with a view of having them issue this bond to you with the understanding of course that you are to pay the premium. If the matter could be covered by credit insurance we believe that it would be the better way to do. As a matter of fact, Mr. Wetsel, there will be no shortage in tires and there will be a very small amount of loss on accounts we can assure you because we will make it our special business to see that Miller's interests are protected on this deal. But, as stated before, we are willing to comply with your requirements in whatever would be a proper form. Awaiting your further advice, we are,

Yours very truly,

W. D. NEWERF RUBBER COMPANY.

WDN—PE. Per \_\_\_\_\_.

U. S. District Court. No. 1972. Receiver's Exhibit No. 5. Filed March 30th, 1915. Helm, Referee.

[Miller's Exhibit No. 9—Letter, September 14, 1914.]

[49] (Letter-head.)

Los Angeles, Cal. Sept. 14th, 1914.

Miller Rubber Company,

Akron, Ohio.

Gentlemen:

We are in receipt of your night letter of September 12th and replied to same as per our telegram this date and herewith beg to confirm same:

“Complying your request. Mailing check and note to-day. Advise bank.”

We are enclosing you herewith our check for \$139.75 same being interest on notes falling due September 15th, amounting to \$154.98 less \$15.23 interest that we have charged back to you on commissions earned and payable to us of \$2,770.01 for July, or in other words we are charging you the interest from August 13th to September 15th, and you will apply this amount on our notes which we trust you will find satisfactory.

There appears to be a considerable difference between us in the commissions earned for July and August. Our figures total for both San Francisco and Los Angeles \$7,091.19. The difference between this amount and the face of the notes due September 15th \$9,149.35 would be as you see \$2,058.16 and for some reason or other you have figured our commissions different which we fail to understand.

However, we as stated in telegram are complying with your request and enclose you our note for \$1,000 and our check for \$1058.16, this in accordance with our figures would be overpaying you about \$1,000. However, we are making up a complete statement of commissions earned as of July and August and will send same to you within the next few days showing you how we arrive at our figures and inasmuch as you have been kind enough to show a disposition to assist us to some extent we wish to show our appreciation accordingly by quickly sending you the [50] enclosed remittance, and wish to thank you for the co-operation.

We will write you fully in connection with our re-

port that we will send you immediately as above stated within a few days.

Yours very truly,

W. D. NEWERF RUBBER CO.

WDN—BM.      Per \_\_\_\_\_,

U. S. District Court. No. 1972. Miller's Exhibit No. 9. April 5th, 1915. Helm, Referee.

**[Miller's Exhibit No. 13—Night Letter.]**

**[51] (Night Letter.)**

Akron, Ohio.

W. D. Newerf Rubber Co.,  
Cor. Pico and Hope Streets,  
Los Angeles, California.

August check for commissions as three thousand one hundred seventy-three dollars and two cents and with July commissions will be applied by us on notes fifteenth. You understand, however, we do so on condition you mail us the balance Monday as follows: Ninety-day note for two thousand dollars and your check for two thousand eleven dollars and seventeen cents plus interest and collection charges on notes forwarded for collection. You can surely spare check for this latter amount. Wire us Monday early that you are complying and we will arrange to relieve you of further annoyance Tuesday. This proposition submitted you in absence of Mr. Pfeiffer and we urge your strict conformity in every respect.

MILLER RUBBER CO.

U. S. District Court. No. 1792. Miller's Exhibit No. 13. Filed April 5th, 1915. Helm, Referee

## [Miller's Exhibit No. 10—Letter.]

[52] Letter-head.)

Akron, Ohio.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

Your telegram of the 20th duly received with reference to July commissions.

In view of the correspondence going forward today you realize perhaps one reason for our not taking care of this as promptly as you might wish and we might add that another reason which you may fail to realize and to which we refer in the aforementioned letter is the lack of July billing which was not received by us until late in the month.

What we propose to do is to send a check covering said commissions of July to the Citizens National Bank of Los Angeles with instructions to reduce the amount of the notes due on September 15th, by such sum which under the existing circumstances we are confident will meet with your entire approval.

We cannot see how under the conditions you can criticise our action in this respect and shall be pleased to receive your acknowledgment that this is entirely satisfactory.

Yours very truly,

THE MILLER RUBBER COMPANY OF  
CAL.

Credit Dept.

CRW-GD.

U. S. District Court. No. 1972. Miller's Exhibit  
No. 10. Filed April 5th, 1915. Helm, Referee

[Miller's Exhibit No. 11—Letter December 3, 1914.]

[53] (Carbon Copy.)

Akron, Ohio, Dec. 3d, 1914.

W. D. Newerf Rubber Company,  
Los Angeles, California.

Gentlemen:

San Francisco is billing accessories out under the name "The Miller Rubber Company of California." Why have you not handled your accessory business on this basis?

The contract and supplement which we entered into distinctly calls for such an operation and we will have to ask that commencing the first of next month that you make no further sales through the W. D. Newerf Rubber Company, that all sales be billed out as contemplated by the contract under the name "The Miller Rubber Company of California," as sold.

Please acknowledge receipt of this letter assuring us that our wishes in this respect will be carried out in future.

Yours truly,

THE MILLER RUBBER COMPANY OF  
CALIF.

Credit Department.

CRW-GD.

U. S. District Court. No. 1972. Miller's Exhibit No. 11. Filed April 5th, 1915. Helm, Referee.

[Trustee's Exhibit "A"—Letter, Miller Rubber Co., Akron, Ohio, to Miller Rubber Co., Los Angeles, Cal.]

[54] (Letter-head.)

Akron, Ohio.

(Subcommissions.)

The Miller Rubber Company of California,  
Los Angeles, California.

Gentlemen:

We are in receipt of your favor of the 25th ult., including commission statements for July and August, the difference in our statements exists in the point that we deducted five per cent (5%) for cash from all invoices whereas you figured them net. In this connection we prefer to handle the matter a little differently. We would suggest as we have been doing in the past deduct five per cent for cash from all invoices and then if these invoices are paid net by the customer that you make out a list of cash discounts due you at the end of the month and forward the same to us to be checked. This will then be included in our regular monthly installment to you.

Regarding the figuring of commission by the total amount of figures for one month we would say that if you desire you may check our figures accordingly but we ourselves prefer to figure out each individual invoice although it involves more work. If there is a mistake in our figures it is more difficult for you to point out the mistake by the method you use than if figured by each individual invoice.

Of course it is for you to decide as to the method

you will use in checking our figures but we would like to have you go over our figures each month to insure yourselves and not only ourselves that you are getting the correct amount of commission for the business you secure for us.

Trusting that this method will appeal to you and that we shall hear from you further along these lines we beg to remain.

Yours very truly,  
MILLER RUBBER COMPANY OF CALIFORNIA.

Commission Dept.

PEC-LL.

U. S. District Court. No. 1972. Trustee's Exhibit "A." Filed June 25th, 1915. Helm, Referee.

[**Trustee's Exhibit "B"—Letter, October 15, 1914.**]

[55] (Carbon Copy.)

Los Angeles, Calif., October 15th, 1914.

Miller Rubber Co.,

Akron, Ohio.

Gentlemen:

Attention Commission Department.

Your letter of the 5th inst. received. We note that in figuring commissions you deduct five per cent cash discount from all invoices. We cannot agree with you that this is correct.

The contract our copy of which you have not yet returned to us provides that our commission is to be the difference between  $12\frac{1}{2}\% - 12\frac{1}{2}\% - 10\% - 5\%$  off list and the prices at which goods are sold to customers. The price to customers is the invoice price.

At time the commissions are figured at close of

month's business there is no way of telling whether customer may in future take cash discount.

We, therefore, maintain that our method of arriving at amount of commissions is correct besides being simpler and involving much less work.

In this connection we beg to say that the demands upon us by Miller Rubber Company in the way of bookkeeping, clerical work, etc: are constantly becoming greater and as we are already doing all that should be expected of us along these lines we do not feel inclined to do more.

We send to you daily copies of all invoices and credit memorandums also collection statements. You thus have complete information of all movements of stock and of the condition of customers accounts.

The compiling of this information is up to us and we cannot undertake to do it unless you wish to make an allowance to cover cost of the work.

Yours truly,

W. D. NEWERF RUBBER CO.,

Per \_\_\_\_\_,

J. F. R.-L. C.

U. S. District Court. No. 1972. Trustee's Exhibit "B." Filed June 25th, 1915. Helm, Referee.

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[56] (Caption.)

#### **Special Master's Report.**

To the Honorable Judges of the District Court of the United States, Southern District of California: I, Lynn Helm, Referee in Bankruptcy, by an order

entered herein on the 23d day of March, 1915, appointed Special Master upon the petition of the Miller Rubber Company, for the delivery of certain property in the possession of the receiver of this court, to hear and determine the issues raised by said petition and such answer as might be filed by the receiver or the petitioning creditors in reply thereto, and to report my findings of fact and conclusions of law to the court, do respectfully report:

That I was attended by Messrs. Bicksler & Smith, counsel for the Miller Rubber Company, and also by Norman A. Bailie, Esq. and Dave F. Smith, Esq., attorneys for the Citizens Trust & Savings Bank, receiver herein, and having heard the testimony produced on behalf of the Miller Rubber Company and on behalf of the bankrupt, and having heard the arguments of counsel and being fully advised in the premises do respectfully report as follows:

1. I find that on the 6th day of November, 1911, the Miller Rubber Company, the petitioner herein, and the Prudential Rubber Company, and W. D. Newerf, doing business as the W. D. Newerf Rubber Company, entered into a contract (Claimant's Exhibit 2), which is hereto attached.

By the first clause the companies agreed to appoint the bankrupt their sole agent and he agreed to act for them in the capacity of agent in making sales of automobile tires and tubes for certain Pacific Coast territory. He also agreed to maintain offices at Los Angeles and San Francisco. The companies agreed to furnish the bankrupt, on consignment, a stock of goods for the purpose of *supply* customers in said

territory, the quantity to be limited to a reasonable amount.

[57] The fourth paragraph provides "the second party expressly agrees that all goods or stock of goods so furnished by the first parties shall at all times be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner." It was then provided that the bankrupt should furnish the companies the first of each month a complete inventory of all goods belonging to them in the hands of the second party and permit them to take inventory of stock on hand and to make monthly settlements for all purchases from and all shortage in stock. By the seventh paragraph it was provided:

"When desired by second party, four months' notes drawing interest at 5% will be accepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed \$25,000 at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than \$25,000 unless credit of second party becomes impaired."

In the ninth paragraph it was provided that upon the expiration or termination of the agreement, or any renewal thereof, bankrupt should surrender and turn over to first parties all property belonging to them, and make full and complete settlement of accounts for all property that may have been entrusted to them. A schedule of prices was attached, the dis-

counts allowed to be the bankrupt's profits in handling the goods.

There has been no agreement between the parties to this contract as to its termination and no notice has been given by the companies of its abrogation and it is still in full force as to goods shipped by the Miller Rubber Company of Ohio to the bankrupt prior to July 1, 1914.

2. I also find that on the 28th day of August, 1914, the Miller Rubber Company of California entered into an agreement [58] with W. D. Newerf, the bankrupt, as of date June 11, 1914, and to take effect on the first day of July, 1914, which is returned herewith marked "Miller Rubber Company's Exhibit No. 3" which is hereto attached.

3. At the same time and as supplemental to the agreement last herein mentioned, an agreement as of date June 11, 1914, was entered into between the Miller Rubber Company of California and W. D. Newerf, and which is attached to exhibit 3 last above referred to, hereto attached.

4. I find that the Miller Rubber Company who filed the original petition to reclaim certain goods herein is a corporation organized and doing business under the laws of the State of Ohio, and having its principal place of business at Akron, in the State of Ohio.

5. I find that the Miller Rubber Company of California is a corporation duly organized and existing under the laws of the State of California, with its principal office at San Francisco, in the State of California, and also having an office at Akron, in the

State of Ohio. The Miller Rubber Company of California, last mentioned, was organized for the purpose of acting as the agent in handling and selling the goods of the Miller Rubber Company of Ohio and to enable the Miller Rubber Company of Ohio to have a representative in the State of California, thereby saying the Miller Rubber Company of Ohio from filing a certificate and paying license fees, and being licensed to do business in the State of California. It was also organized to protect the name of the Miller Rubber Company in California, and to prevent so far as possible trade competition therewith. It is a distinct corporation from The Miller Rubber Company of Ohio and while it does appear from the evidence that the officers of the two corporations are the same and it is owned and controled by the stockholders of the Miller Rubber Company of Ohio, [59] nevertheless the Miller Rubber Company of California is a distinct entity and must be in all respects treated as such in its dealings with the bankrupt.

The petition originally filed herein was by the Miller Rubber Company of Ohio. It was apparent after the contracts above referred to were offered in evidence that the tires and accessories which were desired to be reclaimed at once and which were necessary to supply the Miller Rubber Company's trade in California were the property of the Miller Rubber Company of California and could not be recovered by the Miller Rubber Company of Ohio, and permission was therefore given to the petitioner to file an amended petition and join therein with the Miller Rubber Company of Ohio, the Miller Rubber Company of

California, it being understood that the allegations of the amended petition should be deemed denied by the receiver. This amended petition of The Miller Rubber Company of Ohio and the Miller Rubber Company of California is returned herewith and the proceedings subsequent to the filing of the same were had upon that amended petition as well as the original petition.

6. The questions presented are the proper construction of, and the effect to be given to, the several agreements above set forth, as between The Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the bankrupt. Taking these up in their order I have come to the conclusion that all goods and merchandise shipped and delivered by the Miller Rubber Company of Ohio to W. D. Newerf, under the contract of November 6, 1911, and prior to the first day of July, 1914, and which came into the possession of the receiver herein at the time of his appointment, became the property of the bankrupt's estate and as such pass to the trustee in bankruptcy. At the time of the bankruptcy these goods were in the possession of the bankrupt, commingled with other property and goods in his possession. They have since been segregated by the receiver and trustee and are held by the trustee subject to these proceedings. The rights of [60] the parties depend upon the real and complete agreement between the Miller Rubber Company of Ohio and the bankrupt.

As was said by the Court, in *re Harrington*, 32

A. B. R. 828, in passing upon a similar question—

“The Court is not limited to the mere language of the written instrument; it may examine all the facts concerning the matter and determine whether the written contract was made in good faith or was merely colorable, and if made in good faith whether its provisions for the retention of title were waived by the vendor.”

*In re Garcewich*, 8 A. B. R., 149, was upon a petition for the review of an order of the District Court as a court of bankruptcy, directing the trustee to return to the United Shirt & Collar Company certain goods, ware and merchandise claimed by that company to belong to it and claimed by the trustee to be a part of the bankrupt's estate. The goods were sold to the bankrupt by the United Shirt & Collar Company upon credit and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until the payment of the purchase price. The Court said:

“It is the settled law of this State that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But

when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, [61] and the title to have been vested absolutely in the buyer. *Ludden v. Mazen*, 31 Barb. 650; *Frank v. Batten*, 49 Hun. 91, 1 N. Y. Supp. 705; *Bonesteel vs. Flack*, 41 Barb. 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee."

*In re Miller & Brown*, 14 A. B. R. 439, the Magee Carpet Company sold to the bankrupts certain carpets upon the understanding that what the firm sold should be paid for and what they did not sell could be returned. The Court said of this order:

"It constituted nothing more than what is known in the law as a contract of 'sale or return,' in which the title passes to the party to whom the goods are delivered, subject to the exercise of the option given to return them if he so desires. *Moss v. Sweet*, 16 Q. B. 493; *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 109 Pa. 16. This, it is true, is not the case where the party has the option of returning the goods, if they prove unsuitable or unsatisfactory, of which he is necessarily the Judge, the consignee there holding as bailee for the time within which he is called upon to declare his purpose with regard to

them, which, if unspecified, must not exceed what is reasonable. *Butler v. School District*, 149 Pa. 351. But where the right to return does not depnd upon any such consideration, but upon the mere will of the consignee, however moved, the transaction is a sale, and the title vests. 24 Am. & Eng. Ency. Law (2d ed.), 1024. And that is the situation here."

It is said of this case that it was decided by the District Court of the Eastern District of Pennsylvania and that *conditioned* sales are not favored under the laws of the State of Pennsylvania, but that in all cases where conditional sales might be good in other states they have been held to be invalid under the laws of [62] the State of Pennsylvania, and that the title immediately passes to the vendee. It was recognized in that case that in cases of this character the local law governs and that the title of the trustee is determined by the question whether the arrangement with regard to the property is good as regards creditors. The same criticism cannot be made with reference to the decisions of courts in the states of New York or Massachusetts, for they like California recognize in all respects the rights of vendors in conditional sale contracts.

In the matter of Harrington, *supra*, decided by the District Court of Massachusetts, the property in dispute consisted of a great number of parts of automobiles for us in Everitt cars, at the time of the bankruptcy in the possession of the bankrupt, commingled with other goods. They were subsequently separated by the trustee and held subject to the proceedings in that matter. The claimant of the

goods had granted to the bankrupt the sale of Everitt automobiles in certain New England States and had agreed to sell said automobiles to the dealer at certain specified discount prices, the bankrupt to be allowed 30% discount from the last list prices established by the manufacturer. The ninth clause of the contract provided that it was "expressly understood and agreed that the title to each and every automobile and to all automobile parts furnished to said dealer under the terms of this agreement shall not pass to the dealer until same is fully paid for in full and cash." The dealer deposited with the manufacturer the sum of \$3,000 to apply as deposit on the cars ordered, with the understanding that said sum "will be credited by the manufacturer to the dealer, and will be repaid when all the cars contracted for are delivered and paid for, except that any part or all of said deposit may at the option of the manufacturer be credited against any parts of open account due the manufacturer from the dealer."

**[63]** The dealer agreed to maintain the manufacturer's list price, to keep a repository and repair shop for automobiles, and that the deposit might be retained by the manufacturer as liquidated damages for the dealer's breach of the contract. The Court said:

"The parts of the Bankruptcy Act by which the rights of the parties are to be determined are as follows:

'Claims which for want of record or for other reasons would not have been valid liens as against

the claims of the creditors of the bankrupt shall not be liens against his estate.' Section 67a.

'Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' Section 70a (5).

'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon.' Section 47-(2).\* \* \*

It is apparent that neither the claimant nor the dealer understood or believed, either at the time when the written contract was made or subsequently, that its terms were to be lived up to. Its stringent provisions in regard to the retention of title were inserted, not for the purpose of every day business, but only in an effort to safeguard the rights of the vendor in case the dealer should fail. The parties plainly contemplated that the parts in question were to be taken and kept by the bankrupts in order that they might be promptly accessible for repairs upon Everitt automobiles in the dealer's territory, and that, as such parts should be needed for repairs, the bankrupts should sell and deliver them to the persons upon whose automobiles the parts were used.

[64] It is absurd to suppose that the claimant can now replevy, from the various persons whose Everitt cars were repaired by the bankrupts, the parts used in such repairs, although by the literal terms

of the contract of June 26, 1911, the claimant would have that right. Both parties to the contract understood that it did not mean what it said, and that the dealer did have the right to sell and dispose of parts in the ordinary course of business. It is to be observed that the vendor made no reservation of its right to the proceeds of such sales, no provision to insure upon the parts, no prohibition against mingling the parts with other goods, or the proceeds of the sales with other money of the dealer. The actual agreement between the claimant and the bankrupts is to be gathered, not from a single clause of the written contract, but from the complete understanding between the parties. The formal reservation of title in the written instrument is contradicted and nullified by the unwritten parts of the agreement, and the written contract is *pro tanto* merely colorable. \* \* \*

The case is of course to be determined according to the law of Massachusetts, under which special interests in personal property are strongly protected. At the same time it seems to me that—

‘The real purpose and understanding (of the parties to the contract) were to make an effectual sale, and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to provide the right to take the goods in event of disaster overtaking the (Harrington) concern.’ Day, J., in *Ludvigh, Trustee, v. American Woolen Co.*, 231 U. S. 522, 31 Am. R. B. 481, 34 Sup. Ct. 161, 58 L. Red. —, December 15, 1913.

Several of the most important factors which were

relied upon by the Supreme Court in the Ludvigh Case as indicating good faith and the validity of the agreement there in question are entirely absent in this case."

[65] This case was afterwards affirmed on appeal in the Circuit Court of Appeals of the First Circuit, in Flanders Motor Company v. Reed, Trustee, 33 A. B. R. 842. Dodge, C. J., delivering the opinion of the Court said:

"The case, as the opinion below states, is to be determined according to the law of Massachusetts, which does not make recording necessary to the validity of an agreement for conditional sale. If the provision for reservation of title in Clause 9 expresses an agreement made in good faith, intended by both parties to be actually observed according to its terms in their dealings regarding the parts in question, and in fact so observed by them until the bankruptcy, the petitioner is entitled to the parts as against the bankrupt's trustee.

We do not find in the fourteen other clauses of exhibit "D" containing numerous other stipulations between the parties as to their contemplated dealings with the goods to be furnished, any provisions adopted to secure such dealings with the parts furnished or their proceeds, while in the bankrupt's hands, as it would be natural to expect had retention of title by the vendor been what the parties really intended by their agreement, taken as a whole. Thus, as the opinion below points out, there were no provisions either that the proceeds should be in the vendors in case of sales made by

the bankrupts or that the parts should be kept distinct in any way from the bankrupts' other goods until sold, or that the parts remaining unsold at the end of the year for which the agreement was to continue should be returned to the vendor. \* \* \*

As to the course of dealing followed with regard to the parts or their proceeds, the bankrupts sold and delivered the parts on hand as if they were their own, in the ordinary course of their business, and without keeping the proceeds of such sales in any way distinct from their other moneys. The parts so sold of course became parts of the machines to repair which they were [66] bought from the bankrupts. The petitioner, knowing that the parts furnished, and the proceeds thereof, were being thus dealt with by the bankrupts, recognized what was being done without objection."

In many respects the agreement in the suit at bar is similar to the agreement referred to in the Harrington case, and the conditions of trading recognized between the claimant here and the bankrupt were similar to those set forth in that case. There were no provisions in the contract and nothing done between the parties in their dealings prior to the first of July, 1914, that were in any way adopted to secure such dealings with tires and accessories furnished by the claimant or their proceeds while in the bankrupt's hands, as would be natural to expect, had the retention of title by the vendor been what the parties really intended by their agreement, taken as a whole. There was no agreement that these goods should be kept distinct and apart from

other goods held by the bankrupt until sold, and the bankrupt actually sold and delivered the tires and accessories delivered by the claimant, in the ordinary course of his business. He did not keep the proceeds of said sales in any way distinct from other moneys and the title to the tires and accessories sold immediately passed to the buyer. The claimants, as the evidence shows, knew that this was the method of dealing by the bankrupt. The provision of the contract that the bankrupt may settle his account with the claimant by the giving of four months' notes is not only significant but is of itself inconsistent with any idea that the title to the goods was to be held and retained by the vendor. The stipulation that the title is to remain with the vendor is entirely inconsistent with these provisions of the contract and with the entire purpose of the contract. This must have been recognized by the claimant or else there was no necessity of entering into the second contract of June 11, 1914, hereinabove referred to, and which is far [67] different in its terms from this contract.

In all respects last above referred to, the agreement of June 11, 1914, between the Miller Rubber Company of California and the bankrupt, and also the agreement referred to in Ludvigh vs. American Woolen Co., 231 U. S. 522, 31 A. B. R. 481, and in General Electric Co. vs. Brower, 221 Feb. 597, upon which cases the claimant relies, differ from the agreement here. In these agreements last above referred to a different course of dealing *the parties* appears to have been followed with *respect* to the

goods furnished or their proceeds, and such a different course of dealing is provided for in the several agreements. It is noticeable that the proceeds of sales of goods made by the bankrupt in each of these cases were deposited for the account of, or regularly turned over to, the consignor.

The case of *Ludvigh vs. American Woolen Co.* was first before the Circuit Court of Appeals (188 Fed. 30) and its decision affirmed by the Supreme Court. In the opinion of the Circuit Court of Appeals it was said:

“Contracts of sale under which title is to remain in the vendor, although the vendee may consume the goods or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that title is to remain in the vendor is entirely inconsistent with the purpose of the contract.” citing the decision of the same Court in *Re Garcewich*, 8 Am. B. R. 149, 115 Fed. 87.

In the case at bar there were no provisions to prevent the vendee from thus consuming the goods or selling them and applying the proceeds to his own use, and in *re Garcewich* therefore applies.

The contract here in question, as interpreted by the parties hereto, as shown by their subsequent acts and dealings, was fraudulent as to creditors, and it must be held that the title to the goods in the possession of the bankrupt at the time of the filing of the petition in bankruptcy, and which were purchased [68] by him prior to the first of July, 1914, under the terms of the contract of November 6, 1911, and which came into the hands of the trustee

in bankruptcy, are vested in the trustee in bankruptcy and cannot be reclaimed by the Miller Rubber Company of Ohio.

7. A far different state of affairs pertains to the goods received by the bankrupt from the Miller Rubber Company of California, subsequent to the first day of July, 1914. The contract of July 1, 1914, in all respects comes squarely within the opinion of the Supreme Court in the case of *Ludvigh vs. American Woolen Company, *supra**, and with the opinion of the Circuit Court of Appeals of the Ninth Circuit in *General Electric Company vs. Brower, *supra**, and it must be held and the goods delivered to the bankrupt as the agent of the Miller Rubber Company of California were held by him under a contract strictly of agency. There is nothing in the contract or in the method by which the business was afterward pursued to in any way impeach the *bona fides* of the contract itself. The goods were kept separate and distinct from other goods owned by the bankrupt and were to be sold by him less an agreed discount, the unsold goods to be returned to the consignor and the proceeds from all goods to be deposited to the account of the Miller Rubber Company of California in the Citizens National Bank of Los Angeles, only to be drawn upon by the duly authorized officers of the Miller Rubber Company of California. The contract was not made for a fraudulent or illegal purpose, but for the purpose of overcoming the evils and weaknesses of the contract of November 6, 1911.

8. Upon the hearing of this matter it became evident that the claimant was entitled to the immediate

delivery of tires, tubes and accessories held by the receiver and coming to it from the bankrupt, who held the property under the provisions of the contract of June 11, 1914. It also became evident that an accounting must necessarily be had between the bankrupt's estate and [69] the Miller Rubber Company of Ohio in reference to the goods purchased from it by the bankrupt and also with reference to the goods handled by the bankrupt as the agent of the Miller Rubber Company of California, and as to the proceeds thereof received by the Miller Rubber Company of California. Accordingly on the 6th day of April, 1915, an order was entered in said matter as follows:

“This cause coming on to be heard upon the order hertofore entered in said court on the 29th day of March, 1915, appointing Lynn Helm, Referee in Bankruptcy, Special Master, to hear the petition of the Miller Rubber Company of Ohio, to reclaim certain goods in the possession of the receiver herein, and an answer having been filed by the receiver, Messrs. Bicksler & Smith appearing for the Miller Rubber Company of Ohio, and Norman Bailie, Esq., Dave F. Smith, Esq., and W. T. Craig, Esq., appearing for the receiver, upon motion of the Miller Rubber Company of Ohio, leave is given to file an amended petition joining in said petition the Miller Rubber Company of California, as petitioner, with the Miller Rubber Company of Ohio, the answer of the receiver heretofore filed to the petition of the Miller Rubber Company of Ohio, to stand as an answer to this amended petition, all matters not

therein admitted to be considered denied.

And thereupon, the Court having partially heard the evidence offered on behalf of the petitioners, and it appearing that the hearing hereon could not be concluded at the present time because of the necessity of taking an account of all transactions between the Miller Rubber Company of Ohio and said bankrupt, and the Miller Rubber Company of California and said bankrupt, but that it was desirable that the goods sought to be reclaimed should be, if possible, delivered to the petitioners, the Miller Rubber Company of California, subject to certain conditions, the Court having heard the argument of counsel and being fully advised in [70] the premises finds from the testimony and the exhibits that have heretofore been offered herein that a contract was entered into between W. D. Newerf and the Miller Rubber Company of Ohio, in November, 1911, which may be known as a consignment contract, under which goods were consigned or sold, as may hereafter be determined, by the Miller Rubber Company of Ohio to Newerf. Subsequently, a contract was entered into between W. D. Newerf and the Miller Rubber Company of California, which is dated June 11, 1914, but was entered into some time subsequent to the 28th day of August, 1914, by which the Miller Rubber Company of California appointed W. D. Newerf as its agent to sell, in certain territory therein described upon a commission basis, the matters under the contract relating to the date as of July 1, 1914.

Newerf was indebted to the Miller Rubber Company of Ohio under the contract of November, 1911,

and had given notes for such indebtedness; he also, on the first of July, had a stock on hand held under the contract of November, 1911. Subsequent to July 1, 1911, Newerf, as agent of the Miller Rubber Company of California sold goods from which he was entitled to commission according to the contract dated June 11, 1914. These commissions were, by specific authority of Newerf given about November 16, 1914, applied upon the indebtedness of Newerf to the Miller Rubber Company of Ohio; since then, the application, if any, has been made without Newerf's consent.

A dispute has arisen between the Miller Rubber Company of California and Newerf as to the amount of the commissions which Newerf should be entitled to, and according to the theory of the auditor of the Miller Company of California, they should not exceed \$12,217.84. On the other hand, Mr. Newerf claims that they should be from eighteen to twenty thousand dollars. It is necessary that an accounting should be taken between the California Company and W. D. Newerf, agent, as to the amount of stock on hand, and the amount of commissions due Newerf, either on [71] account of goods sold and stock for which collections have been made, or *goods sold and stock for which collections have been made*, or goods sold for which remittances are still due. It is therefore ordered that an accounting be taken by the Mushet Audit Company and these accounts as shown by the books of the Miller Rubber Company of California, kept by W. D. Newerf, Agent. The auditor will take the state-

ments of Mr. Wetsel, the auditor of the Miller Rubber Company of California, and also the statement of Mr. Newerf and Mr. Roe, the bookkeeper of W. D. Newerf Company as to their methods of making their respective accounts. If they disagree, the auditor will report the several amounts that the accounts may show upon either theory, either that of Mr. Wetsel or that of Mr. Newerf, or his bookkeeper. The audit company will make a complete audit of the books and as soon as the audit is completed will turn the same over to the Miller Rubber Company of California, but said books to remain in this jurisdiction until the further order of this Court.

An invoice will be taken of goods on hand, received since July 1, 1914, by W. D. Newerf, Agent, from the Miller Rubber Company of California, and they, and all uncollected accounts will be turned over to the Miller Rubber Company of California, upon the Miller Rubber Company of California executing a bond to the receiver in this case in the penal sum of twenty thousand dollars, conditioned that the Miller Rubber Company of California, will on the termination of the accounting pay to the receiver or trustee any moneys that may be found due from the Miller Rubber Company of California to W. D. Newerf, agent, on account of the commissions on goods consigned to him from the Miller Rubber Company of California. And further conditioned for the payment on demand of such portion of any commissions that may be due W. D. Newerf, or W. D. Newerf, bankrupt, on account of

collections from sales of said goods heretofore consigned by the Miller Rubber Company of California to W. D. Newerf, agent, whether upon subconsigned [72] goods, or goods actually sold, as such collections may be made by the Miller Rubber Company of California, and upon agreement of the petitioner in this case, the Miller Rubber Company of California and the Miller Rubber Company of Ohio, to pay any costs that may be ultimately awarded against them.

If a bond is not given in accordance with this order, the goods on hand will remain until the final determination of the audit. The audit company shall allow the representative of the Miller Rubber Company of California access to the books at all times, not interfering with said audit.

An account shall also be taken by the audit company of all goods consigned by the Miller Rubber Company of Ohio to W. D. Newerf prior to July 1, 1914, and on hand on that date, and in the sale of said goods on hand July 1, 1914, and still on hand and held by the receiver or trustee, a separate account of the sales thereof shall be kept. The fund derived therefrom to be subject to the final determination of this Court as to whether the same belongs to W. D. Newerf, bankrupt, or the Miller Rubber Company of Ohio, and any collections of back accounts from sales made of consigned goods last aforesaid, shall be kept separate and distinct from collections from other goods of said bankrupt.

The audit company will also report separately and distinctly in reference to the accessories consigned

under the contract of June 11, 1914, and as to the method in which they were handled by the California Company and W. D. Newerf, Agent.

The bonding company must agree that if the money is not paid by the Miller Rubber Company of California within thirty (30) days after the final award shall be made against the rubber company, that a judgment may be entered for that amount against the bonding company.

AND IT IS FURTHER ORDERED that the hearing on said petitions shall be continued until the coming in of said account, April 6, 1915.

LYNN HELM,  
Referee in Bankruptcy."

[73] The Miller Rubber Company of California having filed a bond in the sum of \$20,000 with the American Surety Company of New York, as surety, conditioned as provided in the order last aforesaid, the receiver was ordered to comply with said order of April 6, 1915, in all respects. Subsequently there was segregated and delivered to the Miller Rubber Company of California, tires, tubes and accessories belonging to it, delivered to the bankrupt subsequent to the first of July, 1914, under the contract of June 11, 1914. Tires, tubes and accessories sold by the Miller Rubber Company of Ohio to the bankrupt prior to July 1, 1914, under the contract of November 6, 1911, of inventory list price value of the sum of \$7,685.23, together with a few accessories of nominal value, in Los Angeles, are being held by the trustee subject to the final order of the Court herein.

9. Pursuant to the order above made the W. C.

Mushet Audit Company, certified public accountants, made an exhaustive examination and report of the books and records of the W. D. Newerf Rubber Company and of the Miller Rubber Company of California, for the purpose of determining the inventory of tires, tubes and accessories on consignment from the Miller Rubber Company of Ohio with the bankrupt on July 1, 1914, sold and unsold, the amount of accounts in cash received by the Miller Rubber Company of Ohio on account of the consigned goods, an inventory of goods received from the Miller Rubber Company of California, sold or on hand, and the total amount owing to the Miller Rubber Company by the bankrupt, and the total amount due from the Miller Rubber Company to the bankrupt. The report of this audit company is filed herewith. As there were no exceptions filed to this report and the date therein set forth by either the Miller Rubber Company of Ohio, the Miller Rubber Company of California, or the receiver, the exact state of the accounts between the claimants herein and the bankrupt may be determined.

10. I find from the report filed that on the 1st day of [74] July, 1914, the bankrupt was indebted to the Miller Rubber Company of Ohio upon notes payable the sum of \$22,116.86, and upon open account payable July 1, 1914, \$12,749.09, a total of \$34,865.95. As the receiver is entitled to keep and retain the goods on hand July 1, 1914, amounting list price to \$7,685.23, together with the value of a few accessories to be ascertained, the indebtedness above mentioned from the bankrupt to the Miller Rubber

Company on that date should be increased by this sum of \$7,685.23, together with the value of said accessories, less a discount to which bankrupt was entitled under the contract of November 6, 1911, of 10-12½-12½ and 5 per cent. Upon \$34,865.95 notes and account there has been paid since the first of July, 1914, \$8,304.33. It is also contended by the Miller Rubber Company of Ohio that the commissions due Newerf upon sales of goods for September and October, amounting to \$6,863.10, have been applied upon the open account. If they have been so applied they have been applied by authority of the bankrupt, who authorized them on November 12, 1914, to apply commissions due him on the open account (transcript 145) and the proof of claim by Miller Rubber Company of Ohio for the open account for goods on hand July 1, 1914, now retained by the trustee, amounting to a net sum of \$4,950.82, plus the net price of a few accessories on hand not specifically priced, will no doubt show such credits.

11. At all times since the first of July, 1914, it has been contended by the bankrupt, and is now contended by the receiver, that the Miller Rubber Company of California have not allowed the bankrupt full payment for his services as such agent, in that they did not allow him all the discounts and commissions which he was entitled to receive. It was provided in the contract of June 11, 1914, that the said bankrupt was to receive "in full payment for his services as such agent and in full payment of all salaries, rent, clerk hire and other expenses incurred by him, the difference between the price or prices at

[75] which goods are actually sold by said party of the second part and the prices of 10-12½-12½-5 per cent from the Miller Rubber Company's 1914 price list effective December 1, 1913, attached to said contract and made a part thereof." Miller tires are sold to customers upon terms of 5% discount cash, payable on or before the 10th day of the succeeding month. Price lists issued by the Miller Rubber Company to its dealers gave a list price with terms of 5% cash discount. This discount was given by the bankrupt as the agent of the Miller Rubber Company of California and as it was authorized by the Miller Rubber Company of Ohio. It was assumed in the first instance that in all cases the customer would take advantage of this offer, and it was given for the purpose of facilitating collections. If the customer did not take advantage of the offer a rebate was made to the agent. Accordingly the Miller Rubber Company of California in making the bankrupt allowance for his commissions deducted from the price list the 5% discount for cash, claiming that the goods were actually sold for this price, and then from that figure deducted the discounts provided for in the contract of 10-12½-12½ and 5 per cent. The bankrupt's commissions, based upon this figure, would have amounted to \$12,227.84. As against this the bankrupt claims that he should not be charged with this 5% discount allowed to purchasers of tires, but that the sale was actually at the list price without deducting the 5% for cash, and that his commissions should be figured upon the discounts allowed of 10-12½-12½-5 per cent from

list prices. Upon this basis there is a difference between the bankrupt and the Miller Rubber Company of \$4,495.25.

It is therefore for the Court to determine here which basis of calculation is correct. The Miller Rubber Company of California have allowed the bankrupt \$12,227.84 and the bankrupt claims that he is entitled in addition thereto to the sum of \$4,495.25 for which the receiver claims a lien upon the goods of the Miller Rubber Company of California in hand at the date of bankruptcy, [76] and that a judgment for that amount should be entered herein against the Miller Rubber Company of California and its bondsman aforesaid.

The question is whether goods are actually sold at list prices or at a price after deducting the discount of 5% allowed customers for cash. No authorities are presented to me as to what is the proper construction of this contract. As a matter of first impression it would appear that the price at which the goods were "actually sold" should be the price at which the article was quoted to the customer before the discount was allowed; that the selling price is the gross price and that the option given to the customer of taking advantage of a discount is not the actual selling price of the goods. For a time, at the inception of the contract, the Miller Rubber Company allowed the discounts upon the basis of the list price, but subsequently after the first of September put a different construction upon the contract and contended that the commissions to the bankrupt should only be figured upon the net

price finally paid by the customer. It seems to me that the first construction put upon the agreement was the correct one.

WHEREFORE, and as conclusions from the foregoing I find and recommend as follows:

[Conclusions of Special Master.]

I.

That the order entered by me allowing the Miller Rubber Company of California to join in the petition with the Miller Rubber Company of Ohio to reclaim the certain property hereinbefore referred to, should be approved and confirmed.

II.

That the order entered by me on the 6th day of April, 1915, hereinbefore set forth, as to the delivery of certain goods to the Miller Rubber Company of California, the selection and segregation thereof, impounding the goods of the Miller Rubber Company of Ohio, and the order directing the accounting between the Miller [77] Rubber Company of Ohio and the bankrupt and the Miller Rubber Company of California and the bankrupt, should in all respects be approved and confirmed.

III.

That the Miller Rubber Company of Ohio is not entitled to reclaim any of the tubes, casings or accessories sold by the Miller Rubber Company of Ohio to the bankrupt prior to the first day of July, 1914, and which still remain in the hands of the trustee and which were on hand at the time of the filing of the petition in bankruptcy, of the list price of \$7,685.23, and the accessories in addition thereto

in Los Angeles, the value of which has not been ascertained, but which are only of nominal value, but in lieu thereof the Miller Rubber Company of Ohio is entitled to a claim against the bankrupt for the sum of \$4,950.82, plus the nominal value, not yet ascertained, of other accessories in the hands of the trustee in bankruptcy and of the stock on hand with the bankrupt prior to the first day of July, 1915, this amount being the value of said goods at list prices less the discounts allowed said Newerf under the contract of November 6, 1911.

Against this claim the trustee will effect such commissions as were earned by W. D. Newerf from the Miller Rubber Company of California during the months of September and October, which have been applied upon that account by consent of the Miller Rubber Company of California and the said bankrupt, if any such there are.

#### IV.

All goods coming into the hands of the receiver or trustee shipped, delivered or consigned to W. D. Newerf, agent, by the Miller Rubber Company of California under the contract of June 11, 1914, and subsequent to the first day of July, 1914, are the property of the Miller Rubber Company of California and should if they have not already been delivered be delivered to said company.

#### [78] V.

The receiver or trustee in bankruptcy is entitled to recover from the Miller Rubber Company of California or its bondsman, the sum of \$4,495.25, the amount of commissions still due the bankrupt from

said Miller Rubber Company of California. Against this there is no effect whatsoever. There is no privity between the Miller Rubber Company of Ohio of the one part and the Miller Rubber Company of California and the bankrupt of the other part, and moneys were only applied by the Miller Rubber Company of California in settlement of the previous indebtedness due from the bankrupt to the Miller Rubber Company of Ohio, with the bankrupt's consent, prior to the 16th of November, 1914.

## VI.

There has been no consent by the bankrupt to make any further application after that date. The Miller Rubber Company of California has also in its possession, and there should be a judgment against it therefor, the amount of \$269.98 collected by it subsequent to the 20th of November, 1914, and applied without authority upon the indebtedness of the Miller Rubber Company, and also within four months of the filing of the petition in bankruptcy herein, with full knowledge on the part of the Miller Rubber Company of Ohio and the Miller Rubber Company of California of the insolvency of said bankrupt, and with reasonable cause to believe that by the payment of said amount to the Miller Rubber Company of Ohio by the Miller Rubber Company of California the bankrupt was giving a preference.

## VII.

The costs of this proceeding are not due to any fault of the general creditors or the receiver or trustee herein and all expenses of the segregation and delivery of the stock of merchandise owned by

the Miller Rubber Company of California as aforesaid together with the costs of this accounting are attributable to [79] the methods of business conducted by the Miller Rubber Company of Ohio, the Miller Rubber Company of California and the bankrupt. The Miller Rubber Companies should therefore bear the costs of this proceeding.

In making up the accounts and distributing the goods to the Miller Rubber Company of California the following expenses were incurred:

To Belle McGillivrey, shipping clerk.....	\$ 8.10
J. F. Roe, bookkeeper.....	8.34
J. E. Newerf, bookkeeper.....	25.00
W. W. Eakins, inventory and segregation of goods.....	150.00
T. P. Keogh, in segregation and distribution of goods.....	61.50
Mushet Audit Company in making auditor's report.....	789.80
<hr/>	
	\$1,042.74

The Miller Rubber Company of Ohio should pay the costs of segregating and holding the goods in warehouse which have been segregated under the contract of November 6, 1911, and which as hereinbefore stated have a list price value of \$7,685.23, the costs of which storage will have to be ascertained.

Inasmuch as the order of reference herein and nearly all of these proceedings were had prior to the adjudication in bankruptcy herein and prior to the general order of reference to the undersigned as referee, and were had before him as Special Master,

a reasonable allowance should be made to him for Master's fees herein, which should be taxed as costs.

In addition thereto should be taxed the stenographer's fee for reporter's transcript, on this hearing, amounting to \$164.60.

Respectfully submitted,

LYNN HELM,

Special Master.

July 13, 1915.

Filed July 13th, 1915, at 30 min. past 5 P. M.  
Wm. M. VanDyke, Clerk. Murray C. White,  
Deputy.

Filed July 13th, 1915, at — min. past 2 P. M.  
Lynn Helm, Referee. C. Meade, Clerk.

**Agreement [Dated November 6, 1911.]**

[80] THIS AGREEMENT by and between The Miller Rubber Company and The Prudential Rubber Company, both of Akron, Ohio, both corporations existing under the laws of the State of Ohio, as first parties, and W. D. Newerf Rubber Company of Los Angeles and San Francisco, California, as second party:

WITNESSETH: That in consideration of the sum of one dollar (\$1.00) and other valuable consideration by each party to the other paid, and the receipt of which is hereby acknowledged, the parties hereto agree as follows:

First. First parties agree to appoint second party their sole agent, and second party agrees to act for first parties in the capacity of agent in making sale of first parties' Automobile Tires and Tubes

for the States of California, Oregon, Washington, Idaho, Nevada, Arizona and British Columbia, and Hawaiian Islands.

Second. Second party agrees to maintain at its own expense an office and show-room at convenient location in the cities of Los Angeles and San Francisco, California.

Third. First parties agree to furnish to second party on consignment a stock of above goods manufactured by first parties for the purpose of supplying customers and prospective customers in the territory mentioned; the quantity of such stock to be at all times limited to a reasonable amount.

Fourth. Second party expressly agrees that all goods or stocks of goods so furnished by the first parties shall at all times be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner.

Fifth. Second party agrees to furnish first parties on the first of each month, a complete inventory of all goods belonging to first parties in the hands of second party; or if first parties desire, second party agrees to—at any time—permit first parties to have their representative take inventory of stock on hand.

[81] Sixth. It is understood and agreed that second party will make monthly settlements for all purchases from and all shortage in stock of first parties. Remittances to be mailed to first parties on the 10th of each month for previous month's sales.

Seventh. When desired by second party, four months' notes drawing interest at 5% will be ac-

cepted by first parties in settlement for all purchases made by second party from first parties, provided, however, that the total maximum of such notes shall not exceed twenty-five thousand dollars (\$25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to mutual agreement of both parties, but not less than twenty-five thousand dollars (\$25,000) unless credit of second party becomes impaired.

It is understood and agreed that all goods shall be delivered by first parties F. O. B. Los Angeles or San Francisco, California, or Seattle, Washington.

Ninth. It is further distinctly understood and agreed that second party shall, upon the expiration or termination of this agreement or any renewal thereof, or upon its abrogation as herein provided, surrender and turn over to first parties all the property belonging to first parties of whatsoever nature, and shall make full and complete settlement and accounting to first parties for all property that may have been entrusted to second party's custody by virtue of this agreement.

Tenth. Prices to second party from first parties to be as follows: Exhibit "A" attached hereto, prices on The Miller Rubber Company's Casings and Tubes less a discount of 10%, 5%, 5%, 5%, and 5% on Casings, and 10%, 5%, 5% and 5% on Tubes, and exhibit "B" attached hereto, prices on The Prudential Rubber Company's Casings less a discount of 10%, 5%, 5% and 5%.

Eleventh. It is further agreed that if any reduction in prices is made by first parties at any time

during the life of this agreement, that second party shall be entitled to a credit [82] from first parties for the amount of said reduction on all stock on hand at the time said reduction goes into effect.

Twelfth. It is agreed that first parties will always give to second party the lowest prices that first parties give to anyone for goods in any quantity, except for demonstrating or advertising purposes.

Thirteenth. When shipments are made from Akron, Ohio, by first parties to parties in the territory of second party, first parties will render a credit memorandum for the difference between the net amount realized for such sales and the net value of such goods charged at prices made second party by first parties.

Fourteenth. It is understood and agreed that all replacements only on Miller Tires and Tubes are to be wholly under the control of the first parties, but it is agreed that all replacements shall be made by second party, and that a compensation of 10% of amount received be paid by first parties to second party for handling such replacements. All replacements to be made from consigned stock of first parties and to be reported in writing by second party to first parties, provided, however, that first parties are to have the option of putting in their own adjuster if at any time the adjustments made by second party are not satisfactory to first parties.

Fifteenth. First parties agree to pay second party actual cost for repair work done only on Miller Tires and Tubes, necessary to be done to protect the interest of the first parties. The second party to

render invoices to the first parties for such repairs at time repairs are made.

Sixteenth. First parties agree to furnish second party free of charge all samples of Tires and accessories necessary, also advertising matter imprinted with name and address of second party.

Seventeenth. First parties agree to allow one-half of the expense of W. D. Newerf or his manager to the factory, Akron, Ohio, [83] at least once a year during life of this contract.

Eighteenth. It is further understood and agreed that this contract shall be and remain in force until the first day of November, 1916, unless sooner terminated by a written notice from either party to the other 90 days previous to said termination.

Nineteenth. It is further agreed that this contract shall continue for a further period of five years from the date of expiration above mentioned unless sooner terminated by notice as hereinbefore provided and until notice is given to either party by the other in writing at least 90 days prior to said specified date of expiration.

Twentieth. This agreement is not binding until signed by a duly authorized officer of the Miller Rubber Company and The Prudential Rubber Company, and by W. D. Newerf for the W. D. Newerf Rubber Company.

IN TESTIMONY WHEREOF the said parties have signed these presents in duplicate; each retaining a copy, this 6 day of Nov. 1911.

THE MILLER RUBBER COMPANY,

Per WM. F. PFEIFFER,

Secy. & Asst. Treas.

THE PRUDENTIAL RUBBER COMPANY,

Per F. C. MILLHOFF, Pres.

Parties of the First Part.

W. D. NEWERF RUBBER COMPANY,

Per W. D. NEWERF,

Party of the Second Part.

WITNESS: As to W. D. Newerf:

JNO. F. ROE.

[**Agreement, dated June 11, 1914.**]

**[84]** THIS AGREEMENT, entered into at Los Angeles, California, this 11th day of June, 1914, by and between The Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los Angeles, California, party of the second part,

WITNESSETH: that

WHEREAS the party of the first part is a corporation organized and existing under and by virtue of the laws of the state of California, and is duly authorized to conduct business therein; and

WHEREAS, it is the desire of the party of the first part to employ party of the second part as its agent within and for the following territory; viz: the State of California, Oregon, Idaho, Washington, Nevada, Arizona, and in addition thereto British Columbia and the Hawaiian Islands, provided, however, that this provision shall be null and void as to any portion of the aforementioned territory providing the sales made by the party of the second part

do not, in the opinion of the party of the first part warrant the continuance of any portion of said territory, it being understood and agreed that sixty (60) days written notice by the first party to said second party of said first party's dissatisfaction with the sales made by the second party in any portion of said territory shall be sufficient to eliminate any portion of the aforementioned territory from this contract; and it is furthermore mutually agreed that such agency is, and shall be restricted to such matters as are in this agreement, and supplement thereof, set forth, the headquarters and office of the said agent to be at the cities of Los Angeles and San Francisco, California, under and pursuant to the terms and conditions incidental thereto, which party of the second part hereby accepts and agrees to perform.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is hereby agreed by and between the parties hereto that the party of the second part shall enter into the [85] employment of the party of the first part, within the territory hereinbefore specified, for the term of five (5) years.

That the said agency shall cover only the sale of automobile casings and tubes as manufactured by The Miller Rubber Company of Akron, Ohio, unless in express terms otherwise agreed.

That the main office of said agency shall be located at the city of Los Angeles, California.

That the party of the first part will place in stock in the city of Los Angeles, and San Francisco, a gen-

eral and assorted stock of automobile casings and tubes (the product of The Miller Rubber Company, of Akron, Ohio), and other products of the same manufacture, if mutually agreed upon, and keep and maintain the said stock equal to the net value of not less than Twenty Thousand Dollars (\$20,000) nor more than Sixty Thousand Dollars (\$60,000), according to the demand of the trade; said party of the second part agrees to provide a suitable place to store said stock of goods, and to protect the same from all damage, except such as may arise from deterioration by lapse of time.

Party of the first part agrees that on all freight shipments, goods shall be delivered by the first party F. O. B. Los Angeles or San Francisco, California, Portland, Oregon, or any point within territory allotted to said second party, where the freight rate does not exceed \$3.50 per hundred pounds, provided, however, that all shipments shall weigh one hundred pounds (100#) or more, otherwise said shipments shall be F. O. B. Akron, Ohio.

The party of the second part shall make sales from the said stock of casings and tubes to responsible purchasers and at prices not lower than 10, 12½ trade discount, and 5% additional for cash, from the 1914 price-list of The Miller Rubber Company of Akron, Ohio, a copy of which is hereto attached and marked exhibit "A," and made a part hereof, and dated as effective December 1st, 1913, subject to changes in said list [86] and discounts as hereinafter set forth, (and sales of other products at such prices as may be agreed upon from time to time);

and make collections upon all sales and deposit the funds from said sales in such depositary in Los Angeles and San Francisco, as the party of the first part may select, such funds to be deposited in the name of, and to the credit of The Miller Rubber Company of California, subject to the check of the Treasurer, or the duly authorized officer of The Miller Rubber Company of California, and said second party shall make a statement of said bank account to the party of the first part on the first day of each and every month commencing August 1st, 1914.

All sales from consigned stock shall be made in the name of The Miller Rubber Company of California, and shall be on terms of not to exceed thirty (30) days net, except in such cases as may otherwise, be mutually agreed upon in writing by said parties, and except as hereinafter provided.

Party of the second part shall receive in full payment for his services as such agent, and in full payment of all salaries, rent, clerk hire, and other expenses incurred by him, the difference between the price, or prices, at which goods are actually sold by said party of the second part, and the price of 10-12½-12½-5% from The Miller Rubber Company's 1914 price-list effective December 1st, 1913, a copy of which is hereto attached and marked exhibit "A," and made a part hereof, which prices and list are subject to change as hereinafter provided; it being understood that the party of the second part shall assume and pay all collection expense, and assume all losses for bad accounts; and said second party shall execute and deliver to first party

a bond or security of equal protection to first party, and to the approval of first party, in the sum of Twenty Thousand Dollars (\$20,000), guaranteeing the payment to it of all accounts for goods sold by second party, the liability on said bond or other security, to become fixed [87] at the option of first party as to each account, on failure to pay the same within sixty days after maturity, and the surety on said bond shall waive all notice of default in the payment of any account, and shall consent to any extension of time of payment thereof; and said bond shall further be conditioned to secure the safe-keeping and redelivery to first party of all stock so placed in the hands of second party, as hereinafter provided.

Party of the first part will forward, not later than the twelfth of each month, a check or draft covering second party's remuneration as hereinbefore specified.

Party of the second part shall have the right to consign casings and tubes, the property of The Miller Rubber Company of California, to such individuals, firms or corporations, as they may desire, the same, however, to be only with the approval of the party of the first part, and subject to the conditions which said party of the first part may set forth; it being understood and mutually agreeable, that second party shall hold himself responsible and liable at all times for the payment of materials sold by said consignment houses and also for the return of all material remaining unsold at the termination of such consignment.

Party of the second part hereby agrees to forward daily to the party of the first part, at such address as first party may designate, a full and complete report of all sales made during that day, and all duplicate deposit slips, duly certified by the designated depositary showing deposits for that day. Party of the second part also agrees to forward to the party of the first part at such address as first party may designate, on the first day of each and every month a full and complete report of all stock on hand, accounts receivable made in the name of the party of the first part, and unpaid, a total of any accounts which may be doubtful from a collection standpoint, assigned, in the hands of a Receiver, or Bankrupt. **[88]**

Party of the first part reserves the right to sell Miller casings and tubes direct to automobile manufacturers in the territory heretofore mentioned, and party of the second part is not entitled to any commissions or profits on such business. Party of the first part also reserves the right to sell casings and tubes manufactured by The Miller Rubber Company of Akron, Ohio, which may be special in their nature, and different in their quality or construction from said The Miller Rubber Company's standard product, the pneumatic automobile casings and tubes, and said party of the second part is not entitled to any commissions or profits on such business.

Party of the first part reserves the right to change at its option, all price-lists and discounts aforementioned, but it agrees to advise the party

of the second part immediately when any changes are made. Provided, however, that the net difference between The Miller Rubber Company's prevailing special dealer's price, and the price on which second party's compensation is figured, shall be not less than 10%.

Party of the second part hereby agrees to make contracts for clerk hire and rentals, and all other expense in his own name, and assumes and agrees to pay the same, and agrees to hold the party of the first part free from all liability for such expense.

It is understood and agreed between the parties hereto that all adjustments and replacements on Miller tires and tubes are to be wholly under the contract of the party of the first part and the decision of said party of the first part relative to any and all adjustments and replacements, shall be final; but it is further agreed that all adjustments and replacements shall be made by the party of the second part on such basis, and under such conditions, as the party of the first part may establish, and that a compensation of ten per cent (10%) of the amount of cash received from the sale of the replacing tire shall be [89] paid by the party of the first part to the party of the second part for the handling of such replacements. All adjustments and replacements are to be made from consigned stock of the party of the first part, and to be reported in writing by party of the second part to party of the first part. The party of the first part shall, however, have the option of putting in its own adjuster, if, at any time, the adjustments made by

party of the second part are not satisfactory to the party of the first part, or for any other person.

In the event an adjustment is due the customer because of a defective casing or tube, it is mutually understood and agreed that if it is advantageous to the party of the first part that casings or tubes shall be repaired by the second party rather than replaced, that said second party shall make such necessary repairs and charge the party of the first part for same at prices not to exceed those prices set forth in exhibit "B" attached hereto and made a part hereof; and further that the following schedule shall apply to charges of first party for retreading:

1500 miles or less, retread free of charge to customer.

1750 miles, customer shall pay one-third of prices listed on exhibit "B."

2000 miles, customer shall pay one-half of prices listed on exhibit "B."

2500 miles, customer shall pay two-thirds of prices listed on exhibit "B."

and no casings are to be retreated at first party's expense that have given over 2500 miles of service; provided, however, that this privilege of making repairs shall be wholly under the control of first party at all times, and shall be restricted in its scope and prices changed by first party at first party's option, and without prior notice to that effect.

Party of the first part agrees to furnish advertising matter such as they may have, free of charge, and to co-operate [90] with the party of the sec-

ond part in bringing Miller tires to the attention of the car owners in the territory mentioned herein, by mailing from time to time circular letters and other matter direct to the automobile owners, as party of the first part may deem advisable to stimulate business.

Party of the first part will allow at least one hundred dollars (\$100) per month to party of the second part for advertising purposes.

Said second party agrees in consideration of the premises, to devote his whole time and best efforts for said period of five (5) years to the work herein contemplated, with the exception of such times as may be necessary to devote to the management of W. D. Newerf Company.

The within contract shall take effect on the 1st day of July, 1914, and expires on the 1st day of July, 1919, unless sooner terminated.

At the termination of this contract for any reason whatsoever, and unless in express terms renewed, party of the second part agrees to deliver to the order of the party of the first part, or to return to Akron, Ohio, free of all charges, all consigned stock not paid for, it being mutually agreed, however, that should said termination be due to the cancellation of contract at the instigation of the party of the first part, that cartage or transportation charges incurred, by reason of their carriage to such point as may be designated by party of the first part, shall be paid by said party of the first part.

This contract may be cancelled by either party

upon ninety (90) days written notice to that effect, one to the other.

This agreement is not binding until signed by a duly authorized officer of The Miller Rubber Company of California, and by W. D. Newerf.

This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between [91] The Miller Rubber Company, or the Miller Rubber Company of California, and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements, and understandings shall be, and are considered null and void, except as to the unpaid accounts.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their signatures, and said corporation its seal, the day and year first above written.

Witnesses:

CLAUDE M. BUT- THE MILLER RUB-  
LER to BER CO. OF CAL.

By WM. F. PFEIFFER,  
Sec'y.

W. D. NEWERF.

Party of the first part agrees to allow one-half of the expense of W. D. Newerf, or his Manager, to the factory at Akron, Ohio, for at least once a year, during the life of this contract.

The above clause is hereby made a part of contract entered into under date of June 11th, 1914, by and between the Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los

Angeles, California, party of the second part.

Witnesses:

CLAUDE M. BUTLER to THE MILLER RUBBER CO. OF CAL.

By WM. F. PFEIFFER,

Sec'y.

W. D. NEWERF.

**[Supplemental Agreement, Dated June 11, 1914.]**

[92] SUPPLEMENTING AGREEMENT entered into under date of June 11th, 1914, by and between The Miller Rubber Company of California, party of the first part, and W. D. Newerf of Los Angeles, California, party of the second part.

WITNESSETH: That

WHEREAS party of the first part has employed said party of the second as its selling agent for automobile casings and tubes in certain specified territory, and under certain conditions as set forth in contract between said parties, and dated June 11th, 1914, and

WHEREAS it seems desirable and advantageous to both parties that the same arrangement with certain exceptions shall be made and applied to the handling of automobile repair materials and automobile tire accessories;

NOW THEREFORE, it is mutually agreed:

First. That automobile tire repair materials, and automobile tire accessories, shall be handled in the same manner as is contemplated with regard to casings and tubes in said contract of June 11th, 1914, and that all of said contract except as to the basis on which sales shall be made, shall apply to auto-

mobile tire repair materials and automobile tire accessories, the same as if said repair materials and accessories had been originally included in said contract.

Second. That the compensation to said second party for the fulfillment of that part of this contract shall be the difference between the prices at which sales are actually made to their customers, and the prices on attached sheet marked exhibit "C." Party of the first part reserves the right to change their list prices and discounts at any time, and agrees to notify said party of the second part immediately of such action.

Third. That the party of the second part shall have the right under this contract to make sales of automobile tires, repair [93] materials and tire accessories in the territory specified in the original contract, such right to be exclusive as to territory except as hereinafter provided. However, party of the second part agrees to handle the aforementioned materials and accessories to the exclusion of all competitive goods. Provided, further, however, that the party of the first part reserves the right to sell any and all concerns located in the territory granted as exclusive in the original contract, and to which this is a supplement, if the party of the second part is for any reason, unable to do so, but first party agrees to pay to the party of the second part the difference in price or prices between the actual sales price to the customer, and the prices at which the materials sold would have been charged to the said second party; and be it pro-

vied, further, that the party of the first part shall reserve the right to make sales of fabrics and other materials under this supplement direct to manufacturers of reliners and blow-out patches, and that no commission shall accrue to second party for sales of fabrics and other materials sold to manufacturers of reliners and blow-out patches, unless such sales are actually made by the second party, and at an advance over the minimum price or prices listed on the attached exhibit "C."

Fourth. Furthermore, this supplement may be cancelled at any time by either party on ninety (90) days' written notice, one to the other.

In testimony whereof we have this 11th day of June, 1914, set our hands and seals at Los Angeles, California.

Witnesses:

CLAUDE M. BUTLER to THE MILLER RUBBER COMPANY OF CAL.

By WM. F. PFEIFFER,  
Secy.

W. D. NEWERF.

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[94] Order of Reference.

(Caption.)

IN BANKRUPTCY.

In the Matter of WILLIAM D. NEWERF,

Bankrupt.

WHEREAS William D. Newerf, of Los Angeles, in the county of Los Angeles, District aforesaid on the 9th day of April, A. D., 1915, was duly adjudged

a bankrupt upon the petition filed in this court against him on the 19th day of March, A. D. 1915, according to the provisions and acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to Lynn Helm, Esq., one of the referees in bankruptcy, who is ordered to take such further proceedings therein as are required by said acts, and that the said W. D. Newerf shall attend before said referee on the 14th day of April, 1915, at his office in Los Angeles at 2 P. M. and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said involuntary bankruptcy.

(Signed) BLEDSOE,  
Judge.

WITNESS the Hon. BENJAMIN F. BLEDSOE, Judge of the said District Court and the seal thereto, at Los Angeles, this 9th day of April, A. D. 1915.

WM. M. VAN DYKE.  
By Murray,  
Deputy Clerk.

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[95] (Caption.)

**Notice to Take Depositions [of C. Douglas Lane et al.].**

To Norman A. Bailie and Dave F. Smith, Attorneys for Trustee:

To Citizens Trust & Savings Bank, Trustee:

Please take notice that The Miller Rubber Com-

pany of California and The Miller Rubber Company of Akron, Ohio, will take the depositions of C. Douglas Lane, Bookkeeper of The Miller Rubber Company of California; Thomas D. Pierson, Cashier of said company; F. B. Theiss, Treasurer of said Company, and C. M. Butler before A. R. Doak, Notary Public, at 1247 South High Street, City of Akron, County of Summitt, State of Ohio, on Wednesday, July 28th, 1915, at 10 o'clock A. M., and the said depositions when taken will be read in evidence on behalf of the aforesaid companies upon their petition to recover certain goods, wares, and merchandise, accounts receivable, books, documents, etc. in the above-entitled matter. That the taking of said depositions will be continued from day to day until fully taken and completed.

Dated Los Angeles, California, District aforesaid, this 6th day of July, 1915.

BICKSLER, SMITH & PARKE,  
Attorneys for the Miller Rubber Co., Attorneys for  
The Miller Rubber Co. of California.

**[Objection to Taking of Depositions.]**

[Endorsed on Original:]

“Objection is hereby made to the taking of these depositions for the reason that the case is closed.

NORMAN A. BAILIE,  
One of the Attorneys for Trustee.”

[96] (Caption.)

**Affidavit [of W. C. Smith] in re Depositions and Proof of Claim of the Miller Rubber Company et al.**

W. C. Smith, being first duly sworn deposes and says that he is one of the attorneys of record for The Miller Rubber Company and The Miller Rubber Company of California, petitioners herein for certain personal property; that on or about the — day of April, 1915, Mr. Norman A. Bailie of counsel for the trustee in bankruptcy herein, was duly served with notice pursuant to the United States statutes in such case made and provided, that depositions on behalf of The Miller Rubber Company and The Miller Rubber Company of California would be taken at Akron, Ohio, in due time thereafter according to law; that at the date of serving said notice to take depositions as aforesaid, a proceeding was pending for the audit of the books of the said W. D. Newerf to determine if possible the status of the accounts between The Miller Rubber Company and W. D. Newerf; that said Norman A. Bailie suggested and requested affiant as one of counsel for The Miller Rubber Company and The Miller Rubber Company of California, not to take said depositions at said time but to await the result of the audit of said books as aforesaid as it might, and probably would, save needless costs and expenses in the taking of said depositions and in having said trustee employ an attorney at Akron, Ohio, to examine and cross-examine said witnesses on behalf of the trustee; that

affiant therefore stated to the said Norman A. Bailie that the depositions would not be taken at said time, and that no further action need be taken at that time; that the audit of the books was duly taken and reported, and objections were duly made and entered by Bicksler & Smith as counsel for The Miller Rubber Company and The Miller Rubber Company of California, to said audit in certain respects, and that a hearing was had thereon. That the only matters at issue at said time seemed to be the right of The Miller Rubber Company [97] to recover property alleged to be on hand under a contract between The Miller Rubber Company and the said W. D. Newerf, known as the contract of 1911, and also the issue as to the alleged amount of commissions owing by The Miller Rubber Company of California to the said W. D. Newerf, and at the close of said hearing upon the return of said audit of the books of said W. D. Newerf, one of the auditors thereof stated that the amount owing by the said The Miller Rubber Company of California was and is \$1,284.41; that said case was not closed on said date, and the following morning another page to and of said audit was prepared by the said Mushet Audit Company as affiant understands, and it was then shown by said account that there was due to the said W. D. Newerf from The Miller Rubber Company of California about \$4,653.10; that thereupon a further hearing was had upon the questions and issues involved in said case, and a tentative showing was made that the claim of The Miller Rubber Company was wholly confined to its proof of claim as evidenced by certain

notes in the sum of about \$26,717.23, and that, therefore, certain commissions of about \$3,000 alleged to have accrued to the said W. D. Newerf during September and October, 1914, from The Miller Rubber Company of California, *and* not been credited by The Miller Rubber Company on the amount of the claim or notes owing by the said W. D. Newerf to The Miller Rubber Company; that the same day it was ascertained by telegram from the Miller Rubber Company at its home office at Akron, Ohio, that the said sum of about \$3,000 had been duly credited to the said W. D. Newerf on the books of The Miller Rubber Company pursuant to the agreement by and between said Company and the said W. D. Newerf, and that, therefore, affiant says, it would follow that the greatest amount that would be due to the said W. D. Newerf from The Miller Rubber Company of California would be \$1,507.91.

That there was a further matter in issue, to wit, a claim by the said W. D. Newerf's trustee in bankruptcy that the said [98] W. D. Newerf was, and is entitled to a credit of certain expenses advertising and repairs, for and on behalf of The Miller Rubber Company of California in the sum of \$1,613.12, and it was consistently claimed by The Miller Rubber Company and The Miller Rubber Company of California, at the last hearing before the Special Master, that part of said alleged sum of \$1,613.12 arose under the contract of 1911, between The Miller Rubber Company and the said W. D. Newerf, and that so much thereof as would be shown in the testimony to have arisen under the contract

of 1911, would be a set-off to the proven claim of The Miller Rubber Company instead of being a proposition for a cash payment by The Miller Rubber Company of California to the trustee in bankruptcy of the said W. D. Newerf as arising under the contract of 1914, between The Miller Rubber Company of California and the said W. D. Newerf; that affiant stated to the Special Master at said last hearing, that it would be necessary to take depositions to finally and fully settle the questions and the issues between the parties, and especially with reference to the last item aforesaid, to wit, the repairs and advertising, and that again the said Norman A. Bailie suggested to affiant that we should let that matter rest and that we would be able to settle "this law suit" promptly and without difficulty; but that when affiant saw the said Norman A. Bailie the following day he claimed that there was on hand under the 1911 contract, goods to the amount and value of \$4,000 and that the question remained of the \$1613,12 and some other matters at issue, which showed a difference between the parties of about \$6,000. That affiant learned that the Special Master had made up his mind as to the issues, and is informed by his partner that the Special Master refused to consider further testimony in spite of the statements of affiant in reference to the taking of depositions, and to finally determine the issues, and that said Special Master proceeded to, and did, render and file his opinion and findings. [99] That The Miller Rubber Company and The Miller Rubber Company of California have been wholly misled by the statement of counsel asking and re-

questing that *we not* take depositions, and have suffered great financial loss by being unable to fully establish its and their case by evidence.

That accordingly on or about the 10th day of July, 1915, notice was duly served on counsel for trustee herein that the depositions of certain persons on behalf of The Miller Rubber Company and The Miller Rubber Company of California will be taken at Akron, Ohio, July 28th, 1915, for the purpose of establishing the rights of the said company to the personal property, and proving the issues as to the commissions alleged to be due as aforesaid by The Miller Rubber Company of California to the said W. D. Newerf, and without said depositions being received in evidence that the said claimant companies will suffer great and irreparable loss.

#### PROOF OF CLAIM.

Affiant further says that certain objections were filed to the proof of claim of The Miller Rubber Company, said objections among other things referring to an alleged preference which it is claimed The Miller Rubber Company obtained, in the sum of \$269.98; that affiant is not cognizant of any evidence having been offered, or received in evidence, concerning said alleged preference, and says that the issue in relation thereto is not brought into question, but at the hearing of the aforesaid issues between said parties that it was understood that the issue thereto in relation to said alleged preference was reserved to be determined at the hearing of all of said objections to the claims of The Miller Rubber Company, and not otherwise; that notwithstanding the

objections to said claim the referee has not required the trustee in bankruptcy, nor its counsel, to proceed with the hearing of the objections to said claim, and the objections thereto have never been heard, and the proof of claim of the said The Miller Rubber Company has never been allowed. [100] Although the trustee has ample funds on hand to pay the first dividend of 5% on said claim, to wit: about \$1,300, the same has not been paid, and the referee has now gone on his vacation for some weeks.

#### 1911 CONTRACT ENDED.

##### Attempted Sale of Property.

Affiant further says that the attorneys for the trustee herein were about to arrange for the sale of the property on hand under the 1911 contract, and claimed in these proceedings by The Miller Rubber Company; that the attempted sale thereof was upon the ground that the property was, and is owned by he said W. D. Newerf, bankrupt; and affiant's firm were forced into court with their client, The Miller Rubber Company, before the Special Master herein to obtain the order which is a part of the report of the Special Master herein, refusing and forbiding the sale of said property until these proceedings are determined; that the trustee herein has made no attempt, nor offered to carry on, nor continue said contract of 1911, in any manner or form, and that all complaints, repairs and replacements have been made to and by The Miller Rubber Company, and not otherwise, if at all.

WHEREFORE, affiant asks on behalf of The Miller Rubber Company and The Miller Rubber Com-

pany of California that the matters and issues between the said companies and the trustee in bankruptcy of the said W. D. Newerf be referred to the Special Master for determination after the said depositions shall have been filed herein, and that said Special Master report to this Court his proceedings thereunder after said depositions are read into the record; that report of the Special Master be set aside; and for all other and further relief to which said claimants may be found entitled.

W. C. SMITH.

Filed July 29th, 1915, at 35 min. past 10 o'clock  
A. M. W. M. Van Dyke, Clerk. By Murray C.  
White, Deputy

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[101] (Caption.)

**Affidavit [of C. R. Wetsel] in re Depositions and  
Claim of the Miller Rubber Company et al.**

C R. Wetsel, being first duly sworn deposes and says: That he is the duly authorized agent of The Miller Rubber Company and The Miller Rubber of California for Southern California, with full power of attorney therefor:

**FACTS IN RE TAKING OF DEPOSITIONS.**

Affiant deposes and says that he recalls that W. C. Smith, one of counsel of record for The Miller Rubber Company and The Miller Rubber Company of California, specifically stated to the Special Master herein that it would be necessary to take depositions to fully and finally determine the matters under consideration; and especially to determine when the

the goods were shipped which go to make up the items of \$1,613.12 alleged to be due to the said W. D. Newerf, bankrupt, from The Miller Rubber Company of California for repairs and advertising.

That the claimants herein did not, at any time formally, or at all, or in any wise, close their case, but left it open and reserved the right to take depositions accordingly.

#### WHAT THE DEPOSITIONS WILL SHOW.

That the depositions to be taken herein will show substantially the following facts:

1. That the real party in interest herein is The Miller Rubber Company, and that all personal property, bills and notes receivable, and money handled by The Miller Rubber Company of California, at all times herein was and is the property of The Miller Rubber Company, and not otherwise.
2. That because the said W. D. Newerf, bankrupt, at all times understood and knew that the real party in interest was and is The Miller Rubber Company, and the owner of all the personal property involved in the said agency of the said W. D. [102] Newerf in his contract with The Miller Rubber Company and The Miller Rubber Company of California, that a right of mutual set-off has at all times existed for the proper and ultimate determination of the questions at issue between the parties herein, and for the proper and ultimate determination of the rights of the parties as to the exact and correct amount due to The Miller Rubber Company from the said W. D. Newerf.
3. The Miller Rubber Company of California was

organized solely for the purpose of acting as agent for and on behalf of The Miller Rubber Company in the handling of its rubber goods, supplies and accessories, within the State of California, and for no other purpose.

4. That at all times during the existence of the contracts by and between W. D. Newerf and The Miller Rubber Company and The Miller Rubber Company of California, that but one set of books were kept by the claimants, herein, to wit; that of The Miller Rubber Company, and that the depositions herein will show the correct status of the accounts between the claimants and the said W. D. Newerf as hereinafter set forth.

5. That no set of books is kept for and on behalf of The Miller Rubber Company of California; but that all merchandise, accounts, bills and notes receivable, and all matters pertaining thereto, whether debits, credits, set-offs, counterclaims, or otherwise, existing under all contracts by The Miller Rubber Company of California are entered only on the books of The Miller Rubber Company.

6. That the said W. D. Newerf, bankrupt, knew and understood, and contracted with the understanding, that he was, at all times dealing with The Miller Rubber Company of California as agent of, and that the real party in interest was, and is, The Miller Rubber Company.

7. That while the said W. D. Newerf did, in a communication or communications introduced in evidence, and which are in [103] evidence herein, object to the method of The Miller Rubber Company

of figuring commissions and the amount due thereon to the said W. D. Newerf, that he did in reality adopt the method of The Miller Rubber Company of figuring commissions, to wit, by crediting the said W. D. Newerf with commissions based upon the amount of money actually received in payment or settlement of accounts under and by virtue of his agency of The Miller Rubber Company and The Miller Rubber Company of California.

8. That of the \$1,613.12 alleged to be due and owing by The Miller Rubber Company of California to the said W. D. Newerf, bankrupt, approximately \$1,000 was, and is properly chargeable to the contract of 1911, only.

9. That the balance due to The Miller Rubber Company from the bankrupt herein, or his trustee in bankruptcy, is \$26,717.23, after deducting all credits and set-offs that were, or are, or could possibly be due in any manner to the said W. D. Newerf.

10. That because The Miller Rubber Company is the real party in interest, and that The Miller Rubber Company of California is agent, only, for and on behalf of said The Miller Rubber Company, that, therefore, no money or commissions are due to the said W. D. Newerf, or his trustee in bankruptcy from The Miller Rubber Company of California.

11. That in addition to the claim of The Miller Rubber Company, being \$26,717.23, the property on hand under the contract of 1911, between The Miller Rubber Company and the said W. D. Newerf, bankrupt, at all times herein was, and now is the property of the Miller Rubber Company, and that the contract

of 1911 was entered into by and between The Miller Rubber Company and the said W. D. Newerf, bankrupt, in entire good faith.

12. That all commissions for September and October, 1914, have been duly credited to the said W. D. Newerf, and also for any and all months after July 1st, 1914, as a mutual set-off to [104] all claims made by the said W. D. Newerf, bankrupt, of any sums alleged to be due and owing to him from The Miller Rubber Company, or The Miller Rubber Company of California, on the books of The Miller Rubber Company.

#### OBJECTIONS TO AUDITOR'S REPORT.

Affiant further says that he distinctly remembers that W. C. Smith, one of counsel of record for The Miller Rubber Company and The Miller Rubber Company of California, objected to the report and audit of The Mushet Audit Company filed herein, upon substantially these grounds:

a. Objected to the report and suggestion by said audit company that \$269.98, heretofore paid to The Miller Rubber Company by the said W. D. Newerf, bankrupt, should be returned to his trustee in bankruptcy as being a preference, the objection being upon the ground that no evidence had been offered or received to in any wise indicate that The Miller Rubber Company or The Miller Rubber Company of California knew, or had any information or belief, that the said W. D. Newerf was bankrupt at the time said sum was paid.

b. That counsel for claimants further objected to the method of computing the commissions, said

audit company having adopted the method of computing commissions by the said W. D. Newerf, the difference therein amounting to about \$4,495.25.

c. Said counsel further objected to said report because it was *résumé* of the figures given by the said W. D. Newerf, bankrupt, only excepting upon the figures submitted by affiant as to commissions alleged to be due to said W. D. Newerf.

That one of the auditors of the Mushet Audit Company stated at the close of the hearing upon the return of the audit of the books of the said W. D. Newerf, that the amount owing The Miller Rubber Company of California to W. D. Newerf was, and is \$1,281.41, and that a day or two thereafter an additional sheet of said audit was made by the said Mushet Audit Company showing that there was due to W. D. Newerf from The Miller Rubber Company [105] about \$4,653.10.

And further deponent saith not.

(Sig.) C. R. WETSEL,  
(Verified.)

Filed July 29th, 1915, at 35 min. past 10 o'clock,  
A. M. Wm. M. Van Dyke, Clerk. Murray C.  
White, Depuy.

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[106] (Caption.)

**Affidavit of Norman A. Bailie in re Depositions.**  
United States of America,  
Southern District of California,  
Southern Division,  
County of Los Angeles,—ss.

Norman A. Bailie, being sworn, deposes and says:

That he is one of the attorneys for the trustee in the above-entitled matter, and that he is the Norman A. Bailie named in the affidavit of W. C. Smith, on motion to receive in evidence the depositions of C. Douglas Lane, Thomas D. Pierson, F. B. Theiss and C. M. Butler. Affiant states that while this matter was being heard before Honorable Lynn Helm, as Special Master, to wit, on the 7th day of April, 1915, Messrs. Bicksler & Smith, Attorneys for the Miller Rubber Company and the Miller Rubber Company of California, served affiant with a Notice of the Taking of the Depositions of William F. Pfeiffer, T. D. Pierson, and P. C. Collette. That at the time said notice was served the trial was in progress and affiant stated to said W. C. Smith that if he (Smith) waited for a short time, it might not be necessary to take any depositions. That afterwards said William F. Pfeiffer, one of the witnesses named in said notice, came to Los Angeles and his deposition was taken in this proceeding. That nothing more was said with regard to the taking of said depositions until nearly a month after the case had been closed, and all the testimony, both oral and documentary on behalf of the trustee herein and The Miller Rubber Company and The Miller Rubber Company of California had been introduced, and until after the Special Master had announced that he was ready to render his decision.

That on the 6th day of July, 1915, affiant was served with a notice of the taking of the depositions of C. Douglas Lane, Thomas D. Pierson, F. D. Theiss and C. M. Butler; that [107] affiant refused to

accept service of said notice on the ground that the case was then closed; that in fact the depositions of none of the witnesses named in the notice served on affiant on the 7th day of April, 1915, were ever taken except the deposition of William F. Pfeiffer, taken in Los Angeles, as aforesaid.

NORMAN A. BAILIE.

Subscribed and sworn to before me this 9th day of November, 1915.

[Seal] LOIS DUNLAP,  
Notary Public in and for the County of Los Angeles,  
State of California.

Filed November 15th, 1915. Wm. M. Van Dyke,  
Clerk. By Charles N. Williams, Deputy Clerk.

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[108] (Caption.)

**Exceptions to Report of Special Master.**

Now comes the Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, and make the following objections and exceptions to the opinion and report of said Special Master, and to the findings of fact, conclusions of law and recommendations of said Special Master, as follows:

I.

We except to the findings and report of the Special Master in his determination that the contract of November 6th, 1911, referred to in finding 1, page 1, is still in force, for these reasons:

(a) The contract as of date June 11th, 1914, between the Miller Rubber Company of California and

W. D. Newerf, superseded said contract of November 6th, 1911, above referred to.

(b) In any event, the bankruptcy of said W. D. Newerf would, and did abrogate and terminate the said contract of November 6th, 1911.

(c) The trustee in bankruptcy of the said W. D. Newerf took possession of the property remaining on hand and held under said contract of November 6th, 1911, and attempted to administer and sell the same without any attempt to fulfill and perform the said contract, and thus terminated it.

## II.

We except to the findings and report of the Special Master in finding that the Miller Rubber Company of California is not only a distinct entity, but in all respects must be treated as such in its dealings with the bankrupt, for the reason that all of the property involved herein was owned by and is the property of the Miller Rubber Company, and that said two companies have been at all times treated as one company by the bankrupt, as shown more fully by the undisputed evidence of the proceedings herein.

## [109] III.

We except to the findings and report of the Special Master in finding six, page 4, *et seq.*, that all goods shipped by the Miller Rubber Company of Ohio to Newerf under contract of November 6th, 1911, became the property of the bankrupt's estate, and as such, passes to the trustees in bankruptcy, for the reason that the contract of November 6th, 1911, specially reserved title in and to each and all of said property shipped thereunder to the bankrupt, in the

Miller Rubber Company; and that there is not a scintilla of evidence, nor any inference which shows the said contract of November 6th, 1911, or any portion or part thereof, was, or is, in fraud of the rights of the bankrupt, or of any of his creditors.

IV.

We except to the findings and report of the Special Master in finding nine, pages 17 and 18, of said report in finding that no exceptions were filed to the report of the Mushet Audit Company, and we now refer to the stenographic record of this case for the exceptions and objections which the claimants did, and do now make, which among others, were as follows:

(a) The suggestions and findings by said audit company that \$269.98 should be returned by the Miller Rubber Company to the trustee in bankruptcy of W. D. Newerf, upon the ground that it was a preference.

(b) To the methods employed by the Mushet Audit Company in computing the commissions, and to said company's audit in its general *résumé* and recapitulation taking "Newerf's view" of commissions, and also of the general business dealings between him and the claimants herein, instead of making a report of the facts.

V.

We except to the findings and report of the Special Master in finding ten, page 18, in finding:

[110] (a) That the receiver was entitled to hold the goods shipped prior to July 1st, 1914, or on hand at said date, alleged to amount to \$7,685.23,

or the value of any accessories, or of any other property.

(b) In the figures adduced and set forth in said findings upon the ground that the same are incorrect and not consistent with the facts, and which are more fully set forth in the auditor's report, and depositions to be filed herein.

## VI.

We except to the findings and report of the Special Master in finding eleven, page 20, in finding that for a time, or any time, the Miller Rubber Company allowed discounts upon the basis of the list price, and that it subsequently after the 1st of September, 1914, put a different construction thereon, for the reason that the true construction and meaning of said contract as determined by the Miller Rubber Company and W. D. Newerf was, and is, that his commissions, in full, should be "the difference between the price, or prices, at which goods are actually sold by said party of the second part,—Newerf—and  $10-12\frac{1}{2}-12\frac{1}{2}-5$  per cent from the Miller Rubber Co.'s 1914 price list," and that the price "at which goods are actually sold" was interpreted by the parties herein to be the amount of money actually received by the said W. D. Newerf in payment of settlement for goods sold, and not otherwise.

## VII.

We except to the findings and report of the Special Master in paragraph 111, page 21, in this finding that the Miller Rubber Company of Ohio, is not entitled to claim any of the tubes, casings, or

accessories alleged to have been sold by the Miller Rubber Company of Ohio, to the bankrupt prior to July 1st, 1914, for the reason that all said goods were and now are, the property of The Miller Rubber Company, and not otherwise, and also in holding that because of said findings, the Miller Rubber Company of Ohio [111] is entitled to prove its claim for \$4,950.82 for said tubes, casings and accessories alleged to have been so sold by the Miller Rubber Company of Ohio to bankrupt, and also, and that because thereof, the commissions earned by the said W. D. Newerf from the Miller Rubber Company of California may be applied against said alleged proof of claim for \$4,950.82.

## VIII.

We except to the findings and report of the Special Master in finding five, page 22,

(a) That the receiver or trustee in bankruptcy *are* entitled to recover the sum of \$4,495.25, or any other sum, alleged to be the amount of commissions still due the bankrupt from the Miller Rubber Company of California, upon the ground that there is nothing due, owing or payable from the Miller Rubber Company of California, to the receiver or trustee in bankruptcy herein, and especially because the basis of the commissions due to W. D. Newerf have been incorrectly stated and figured by the Mushet Audit Company and by the Special Master herein, as hereinbefore set forth, and also because all property, accounts, claims and notes at all times herein have been, and now are the property of the Miller Rubber Company of Ohio, and at all times herein, it

has been so understood and agreed by and between the Miller Rubber Company, the Miller Rubber Company of California, and the said W. D. Newerf.

(b) We except to the findings of the Special Master upon the ground that all property, claims, demands and notes belong to, and are the property of the Miller Rubber Company, and that the said W. D. Newerf transacted all his business with the full knowledge that the Miller Rubber Company was, and is the real party in interest, and with which he was in reality transacting business, and that therefore, the Miller Rubber Company is entitled to a mutual set-off of all alleged claims and demands, whether by commission or otherwise, made by the said W. D. Newerf [112] or his trustee in bankruptcy, as against the claims, demands and notes of the Miller Rubber Company in the bankruptcy proceedings herein, as more fully set forth in the recapitulation by the Mushet Audit Company in its report, wherein it shows that the Miller Rubber Company and the Miller Rubber Company of California are in reality one company, and sets forth in its report the mutual credits and set-offs.

(c) And we further except to the findings of the Special Master that there is no privity between the Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the bankrupt, more fully set forth under exception (a) herein.

## IX.

We except to the findings and report of the Special Master in finding six, pages 22 and 23, in holding that:

(a) No consent was given by the bankrupt to make application of commissions to November 16th, 1914, as against the amount owing by him on open account, or notes, to the Miller Rubber Company of Ohio.

(b) That the Miller Rubber Company should repay \$269.98 or any other sum, collected since November 20th, 1914, as a preference, on the ground that there is not a scintilla of evidence, and no inference from any evidence adduced, that the Miller Rubber Company or the Miller Rubber Company of California, had any information or belief, in any manner or form, that the said W. D. Newerf was bankrupt or insolvent at the time said sum was paid by the said W. D. Newerf, and further that the question of whether the sum of \$269.98 was a preference under the bankrupt law was not considered in any manner or form before the Special Master, nor was any evidence bearing thereon, and was reserved for an exception by the trustee in bankruptcy to the proof of claim by the Miller Rubber Company of Ohio, and has not yet been considered, and because thereof, and of their exceptions and objections to said proof of claim by the trustee in bankruptcy herein, [113] said claim has not yet been allowed.

## X.

We except to the finding and report of the Special Master in finding six, page 23, in assessing all, or any part of the costs of this proceeding to the Miller Rubber Company, or to the Miller Rubber Company of California, for the reason that the methods of doing business between the parties involved herein

was, and is now more attributable to the Miller Rubber Company or the Miller Rubber Company of California than to W. D. Newerf, and that correct reports and accounts be forwarded, and properly and promptly, by the said W. D. Newerf accordingly, would have been necessary. Also upon the further ground that the Miller Rubber Company of Ohio, substantially won its case by recovering goods of the estimated value of \$75,000, and that said proceeding was attributable to no other cause than that the receiver and trustee in bankruptcy in the face of their knowledge that there was such a written contract, and contracts, between the Miller Rubber Company of Ohio and the Miller Rubber Company of California, and the said W. D. Newerf refused any adjustment until the matters were heard and determined by the Special Master, and urged an auditing for that purpose.

## XI.

We except to the findings and report of the Special Master in his attempt to close his proceeding before the evidence was all put in, for the reason that at the date of the last hearing, it was specially stated, and should be part of the stenographic report of the proceedings herein, that depositions would have to be taken at Akron, Ohio, to fully and finally determine the questions involved and especially to determine the application of the commissions due to the bankrupt on and after September, 1914, to meet the alleged findings and report of the Mushet Audit Company, and that the same have been properly applied as against the accounts and notes due from the bank-

rupt to the Miller Rubber Company; and to ascertain the interpretation which the parties, [114] to wit: The Miller Rubber Company and the Miller Rubber Company of California, and the bankrupt, placed upon their contract in reference to the basis of figuring or ascertaining the amount of commissions due to the bankrupt, the difference being \$4,495.25; and to determine the question of whether the claim of the bankrupt against the Miller Rubber Company, or the Miller Rubber Company of California, of \$1,613.12 alleged to be due the bankrupt for repairs and advertising was properly allowed under the contract of date June 11th, 1914, or under the contract of November 6th, 1911.

That the questions herein are incomplete and undetermined and inasmuch as the Miller Rubber Company of Ohio have deposited a bond for \$20,000.00 for the matters and things involved herein, the question of delay for the purpose of taking depositions, works no harm or prejudice whatever to any concerned.

WHEREFORE, your petitioners pray that each and all of the foregoing objections and exceptions shall be sustained; that the said cause, and the matters and things at issue and undetermined herein shall be referred to the referee in bankruptcy with instructions to receive any evidence, the depositions taken by the Miller Rubber Company, and to report

its proceedings thereunder to this Court.

THE MILLER RUBBER COMPANY of  
CALIFORNIA.

THE MILLER RUBBER COMPANY.

By BICKSLER & SMITH,  
Their Attorneys.

Filed July 29th, 1915, at 35 mins. past 10 A. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

**[Order Confirming Special Master's Report, Except  
as to Allowance of Commissions to Miller  
Rubber Company, etc.]**

[115] Minute-book.

Page 7.

Law and General.—Bean.

Monday, 22d of November, 1915.

(July term, A. D. 1915.)

Court met pursuant to adjournment.

Present: The Honorable ROBERT S. BEAN, Dis-  
trict Judge.

No. 1972—BKCY, S. D.

In the Matter of W. D. NEWERF, Bankrupt.

This matter having heretofore been submitted to the Court for its consideration and decision on the Miller Rubber Company matter; the Court having duly considered same, and being fully advised in the premises now orally announces its conclusions herein and it is ordered that the Special Master's report filed herein be and the same hereby is in all things confirmed except as to allowance of commissions to Miller Rubber Company as to which it is disallowed,

and it is further ordered that the cost of proceedings in the matter of this reference to Special Master be taxed against said Miller Rubber Company and that the cost of distribution of goods amounting to \$1,042.74 be equally divided between parties hereto, the allowance of the Special Master's fee to be hereafter determined by the Court.

**[Order Allowing Special Master's Fee of \$200, etc.]****[116]** Minute-book.

Page 60.

Law and General.—Bean.

No. 1972—BKCY, S. D.

In Re W. D. NEWERF,

Bankrupt.

Pursuant to stipulation of the parties in interest herein it is ordered that Lynn Helm, Esq., Special Master in this matter be and hereby is allowed a fee of \$200; and it is further ordered on motion of W. C. Smith, Esq., of counsel for petitioners, that the order heretofore on November 22d, 1915, made and entered herein be and the same hereby is vacated and set aside so far as it provides for the taxing and distribution of costs and distributions and it is further ordered on like motion that the cost of making up accounts and distribution of goods of Miller Rubber Company amounting to \$1,042.72 and the fees of shorthand reporter on the hearing amounting to \$164.40 and the Special Master's fee of \$200, aggregating \$1,407.34 shall be equally divided and paid by the parties in interest herein.

Court at the hour of 5:01 o'clock P. M. adjourned until Friday the 3d day of December, A. D. 1915, at 10 o'clock A. M.

(F.F.G.)

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[117] (Caption.)

THE MILLER RUBBER COMPANY and THE MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellant

v.

CITIZENS TRUST AND SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF Doing Business as the W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Petition on Appeal [of Miller Rubber Co. et al.].**

To the Honorable Judges of the District Court of the United States, Southern District of California, Southern Division:

NOW COMES The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation, petitioners for the reclamation of certain goods, wares and merchandise in the hands of the trustee of the estate of said W. D. Newerf, Bankrupt, as by the record and files of this court in this proceeding more fully appear, and, considering itself aggrieved by the order and final decree of this court made and entered November 22, 1915, confirming the order of the Special Master herein, denying said petition made and entered on or

about the 13th day of July, 1915, does hereby appeal from said order and final decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reason and upon the ground set forth in its assignments of error filed herewith.

Your petitioners present herewith their said assignments of error, and their bond on appeal in the penal sum of two hundred fifty (\$250) dollars, with the American Surety Company of New York, a corporation, authorized to act as surety upon bonds generally within this district, and prays that this, its said appeal, may be allowed and that a transcript of the record proceedings and papers upon which said order and final decree [118] were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that a citation issue to the Citizens Trust & Savings Bank, a corporation, the trustee in bankruptcy of the estate of the said W. D. Newerf, to be and appear in said Circuit Court of Appeals on a day certain, as provided by law.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company and the  
Miller Rubber Company of California, Petition  
as Aforesaid.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

**Bond [on Appeal of Miller Rubber Co. et al.].**

[119] KNOW ALL MEN BY THESE PRESENTS that the undersigned, American Surety Com-

pany of New York, a corporation, duly organized and existing under the laws of the State of New York, duly authorized to transact business within the State of California, as surety, is held and firmly bound unto the Citizens Trust and Savings Bank, a corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Bankrupt, in the penal sum of two hundred fifty (\$250) dollars, well and truly to be paid to the said Citizens Trust and Savings Bank, Trustee herein, or to its successors in said trust, for the payment of which we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed and dated at Los Angeles this 6 day of December, 1915.

The condition of this obligation is such that

WHEREAS, The Miller Rubber Company and The Miller Rubber Company, of California, corporations, petitioners herein, have appealed to the United States Circuit Court of Appeals of the Ninth Circuit from the order and final decree of the said District Court of the United States for the Southern District of California, Southern Division, denying the petition of The Miller Rubber Company and The Miller Rubber Company of California for the reclamation of certain goods, and other matters and things therein more specifically set forth, which said final order and decree was made and entered of record November 22, 1915, in the records and files of said court;

NOW, THEREFORE, if the said The Miller Rubber Company and The Miller Rubber Company of

California, corporations, shall prosecute their said appeal to effect and answer all costs and damages that may be awarded against them on said appeal, if they fail to make their said appeal good, then this obligation shall be void, otherwise to be and remain in full force and effect.

[120] IN WITNESS WHEREOF, the seal and signature of the said surety company hereto affixed and attested by its duly authorized officers in the city of Los Angeles, State of California, District aforesaid, this 6th day of December, 1915.

AMERICAN SURETY COMPANY OF  
NEW YORK.

[Corporation Seal]

By F. L. HEMMING,  
Resident Vice-President,  
Attest: W. J. BENNETT,  
Resident Assistant Secretary.

State of California,  
County of Los Angeles,—ss.

On this 6 day of December, in the year one thousand nine hundred fifteen, before me Grace E. Newcombe, a notary public in and for said Los Angeles County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. L. Hemming and W. J. Bennett, known to me to be the Resident Vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and which executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation,

and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said county of Los Angeles, the day and year in this certificate first above written.

[Seal] GRACE E. NEWCOMB,  
Notary Public in and for the County of Los Angeles,  
State of California.

My commission expires September 16, 1918.

Approved Dec. 7, 1915.

R. S. BEAN,  
Judge.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White  
Deputy.

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[121] (Caption.)

THE MILLER RUBBER COMPANY, a Corporation,  
THE MILLER RUBBER COMPANY  
OF CALIFORNIA, a Corporation,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a Corporation,  
as Trustee of the Estate of W. D.  
NEWERF Doing Business as W. D.  
NEWERF RUBBER COMPANY, Bankrupt,

Appellee.

**Order Granting Appeal and Fixing the Amount of  
Bond on Appeal [of Miller Rubber Co. et al.].**

The petitioners, The Miller Rubber Company and

The Miller Rubber Company of California, having heretofore filed their petition for appeal and therewith assignments of error, together with their bond in the penal sum of two hundred fifty (\$250) dollars, conditioned as required by law, with the American Surety Company of New York as surety; and having further given due notice to the trustee of the above-named bankrupt of its said petition and said bond and the time of presenting same;

**IT IS ORDERED** that the said appeal be and the same is hereby allowed to the said petitioners and the amount of said bond on appeal is hereby fixed in the sum of two hundred fifty (\$250) dollars, and the said bond in said penal sum, with the surety aforesaid, is hereby approved; and

**IT IS FURTHER ORDERED** that citation issue to the said Citizens Trust and Savings Bank, as trustee of the said bankrupt estate, as provided by law.

Done in open court at the city of Los Angeles, District aforesaid, this 7th day of December, 1915.

(Signed) R. S. BEAN,

Judge of the District Court for the Southern District of California, Southern Division.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

[122] (Caption.)

**Citation of Appeal [of Miller Rubber Co. et al.  
(Copy)].**

To the Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals of the Ninth Circuit to be holden in the city of San Francisco, in the State of California, on the 3d day of January, 1916, pursuant to the petition on appeal and assignments of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, holding terms in the city of Los Angeles, in said District, in the above-entitled proceeding, in which The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation, and The Miller Rubber Company of California, a corporation, are petitioners and claimants, to show cause, if any there be, why the final decree and judgment rendered in such cause, confirming the order and decree of the Special Master disallowing and refusing the claim and petition of said petitioners, for the reclamation of certain goods, wares and merchandise, and the other matters and things, as in said petition on appeal and assignments of error mentioned and set forth, should not be reversed, set aside and corrected; and why speedy justice should not be done to said petitioners in that behalf.

WITNESS the Honorable R. S. BEAN, United States District Judge for the Southern District of California, Southern Division, this 7th day of December, 1915.

(Signed) R. S. BEAN,  
United States District Judge, Southern District of California, Southern Division.

Filed Dec. 7, 1915, at 30 min. past 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C. White,  
Deputy.

[123] (Caption.)

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**Assignments of Error [on Appeal of Miller Rubber Co. et al.].**

NOW COMES The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, petitioners for the reclamation of certain goods, wares and merchandise in the hands of the Citizens Trust and Savings Bank, Trustee of the above-entitled bankrupt estate, and petitioners on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and final decree of the above-entitled District Court, made and entered November 22, 1915, denying its said petition for reclamation, and herewith makes upon, and pursuant to, its said petition, the following assignments of error, to wit:

I.

The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the title of said goods sought to be re-

claimed was in the trustee of said bankrupt estate and not in The Miller Rubber Company, the petitioner for reclamation.

## II.

The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the contract and transaction therein set forth between said bankrupt and said petitioner, for reclamation, constituted a sale of the said goods by the petitioner to the said bankrupt.

## III.

That said District Court erred in its finding, decision and judgment, under the evidence, that The Miller Rubber Company, the petitioner herein, obtained and had a preference from said bankrupt in the alleged sum of two hundred sixty-nine and ninety-eight hundredths (\$269.98) dollars, or in any other sum.

## IV.

That said District Court erred in its finding, decision and judgment that the Miller Rubber Company of California is a [124] distinct entity from The Miller Rubber Company of Ohio and that in all the matters and things involved herein, it must be so adjudged, upon the ground that The Miller Rubber Company of California was and is at all times the agent of The Miller Rubber Company and that said bankrupt knew and understood at all times that all of his said transactions and contracts were, in reality, with the parent corporation, The Miller Rubber Company.

V.

The said District Court erred in not finding, under the evidence and the law, that the contracts and transactions therein set forth between the petitioner and the said bankrupt constituted and appointed the said bankrupt the agent of The Miller Rubber Company (or ostensibly the agent of The Miller Rubber Company of California) for the sale of all goods on hand or in transit on July 1, 1914; and that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, and now in the hands of the trustee in bankruptcy herein, and remaining unsold, was and is in the petitioner, The Miller Rubber Company, for reclamation.

VI.

The said District Court erred in failing to find, under the evidence and the law, that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, was and is in the petitioner for reclamation, and that the said petitioner for reclamation had and has a present right to all of said goods, wares and merchandise.

VII.

The said District Court erred in its finding, decision and judgment, that the said contract of November 6, 1911, between the petitioner and the bankrupt, is still in force and effect.

[125] VIII.

The said District Court erred in not finding, under the evidence and the law, that the contract of June 11, 1914, and the supplement thereto, between the

petitioner, The Miller Rubber Company of California and the said bankrupt, superceded and annulled the said contract of November 6, 1911, as aforesaid.

#### IX.

The said District Court erred in not finding, under the evidence and the law, that the trustee in bankruptcy herein, by taking possession of the property in the hands of said bankrupt or in transit on June 11, 1914, and attempting to sell and dispose of all of said property, and in making no attempt to carry on the business, would necessarily abrogate and did terminate the said contract of November 6, 1911, if it had had any force and effect after June 11, 1914.

#### X.

The said District Court erred, under the evidence, in its finding, decision and judgment, that no consent was given to the said bankrupt to make application of commissions that might be due to him (ostensibly from The Miller Rubber Company of California) from The Miller Rubber Company, as against the amount owing by him on open account or notes to The Miller Rubber Company of California or The Miller Rubber Company.

#### XI.

The said District Court erred in not allowing the depositions of the petitioners in relation *ao* all matters in controversy between The Miller Rubber Company and the bankrupt to be read in evidence, said depositions being as follows:

C. Douglas Lane, age thirty (30) years, Chief Bookkeeper and Auditor of The Miller Rubber Company, one of the petitioners herein, for five and one-

half (5½) years, testifies that, during the whole of said period, he has been bookkeeping and auditing said company's books; that there is but one set of books for both [126] of said companies, to wit, The Miller Rubber Company and The Miller Rubber Company of California; that those books are the books of the Miller Rubber Company; that The Miller Rubber Company of California kept no other or separate set of books; that the accounts of The Miller Rubber Company of California were kept on the books of The Miller Rubber Company exactly as all other accounts of The Miller Rubber Company, and all cash received from California accounts was deposited in the name of The Miller Rubber Company and credited on its books to the credit of the individual customers of The Miller Rubber Company, to whom the same had been charged, and payment was made by The Miller Rubber Company of all accounts payable to California customers, in the same manner as payments were made to other customers of The Miller Rubber Company; that no other books were kept since the organization of The Miller Rubber Company of California; that all computations of commissions to agents under contracts with such agents are made in witness's department under his supervision; that he is personally acquainted with the method of figuring commissions on said contracts, including the contract between The Miller Rubber Company of California and the said W. D. Newerf; that said W. D. Newerf's commissions were, at all times, computed as follows; All commissions were based upon the prices at which

goods were actually sold by Newerf. If Newerf's price to the customer was net, we computed commissions on the actual price given, but if, as in most instances, Newerf's customer was allowed a discount of 5% for cash, we computed commission by first deducting the 5%, on the assumption that the customer would take advantage of the cash discount, and computed the commission upon the remaining 95% of the bill. If, however, the customer did not take advantage of the 5% discount for cash, but paid the full amount of the bill, we, at the end of the month, gave Newerf credit for the full amount of the 5% discount which the customer was entitled to if they had taken advantage of it. We computed [127] these commissions in the same manner on both the San Francisco and Los Angeles accounts, and we have computed all commissions to all agents under similar contracts in precisely the same manner; that from witness's own knowledge, verified by the books of The Miller Rubber Company, the said W. D. Newerf is entitled to credit, and has been given credit, on the books of The Miller Rubber Company, from July 1, 1914, to March 20, 1915, of thirteen thousand two hundred forty-five and seventy-two hundredths (\$13,245.72) dollars, as shown by the books of original entry made a part of said deposition; that the total amount of commissions due to said W. D. Newerf on his San Francisco business between July 1, 1914, and January 1, 1915, was \$4,731.59. Said W. D. Newerf's claim for commissions in said city during said time is five thousand two hundred seven and eight hundredths (\$5,207.08)

dollars; that the difference is evidently based upon the argument over the 5% discount for cash.

Witness knows F. B. Thies, who is treasurer of The Miller Rubber Company and The Miller Rubber Company of California, and Mr. William F. Pfeiffer, who is secretary and general manager of The Miller Rubber Company and Secretary of The Miller Rubber Company of California, both directed that the amount of commissions due to the said W. D. Newerf, under his said contract, be credited, and that said commissions were credited, to the said W. D. Newerf's open account, said open account being the amount due The Miller Rubber Company by the said Newerf, accruing between July 1, 1914, and March 20, 1915; that witness is familiar with the bills receivable of the said W. D. Newerf to The Miller Rubber Company; that, on July 1, 1914, The Miller Rubber Company held the said W. D. Newerf's notes as follows:

Note of March 14, 1914, due July 14, 1914..	\$2,000.00
Note of March 14, 1914, due July 14, 1914..	2,000.00
Note of March 14, 1914, due July 14, 1914..	1,500.00
Note of March 14, 1914, due July 14, 1914..	1,500.00
[128] Note of April 15, 1914, due August	
15, 1914.....	\$2,000.00
Note of April 15, 1914, due August 15,	
1914 .....	1,562.69
Note of April 15, 1914, due August 15,	
1914 .....	2,959.88
Note of April 15, 1914, due August 15,	
1914 .....	2,500.00
Note of May 15, 1914, due Sept. 15, 1914...	
	2,284.61

Note of May 15, 1914, due Sept. 15, 1914 . . .	2,000.00
Note of May 15, 1914, due Sept. 15, 1914 . . .	2,864.74
Note of May 15, 1914, due Sept. 15, 1914 . . .	3,000.00
Note of June 13, 1914, due October 12, 1914 . . . . .	1,800.00
Note of June 15, 1914, due October 15, 1914 . . . . .	2,810.08
Note of June 15, 1914, due October 15, 1914, . . . . .	2,500.00
Note of June 15, 1914, due October 15, 1914 . . . . .	1,702.45
Note of June 15, 1914, due October 15, 1914, . . . . .	2,000.00
Note of June 19, 1914, due October 15, 1914 . . . . .	2,000.00

That said notes aggregate thirty-eight thousand nine hundred eighty-four and forty-five hundredths (\$38,984.45) the first eight (8) amounting to sixteen thousand twenty-two and fifty-seven hundredths (\$16,022.57) dollars, were paid at maturity; that the four (4) notes dated May 15, 1914, due September 15, 1914, aggregating ten thousand one hundred forty-nine and thirty-five hundredths (\$10,149.35) dollars, and were not paid at maturity, but, at maturity, said W. D. Newerf sent a check for one thousand one hundred ninety-seven and ninety-one hundredths (\$1,197.91) dollars, and a new note for one thousand (\$1,000) dollars due December 14, 1914, and the balance on said four (4) notes was charged back to said W. D. Newerf's open account on date of maturity of said four (4) notes; that all of the afore-described eighteen (18) notes were given by the said

W. D. Newerf to apply on the amount due from him, W. D. Newerf, to The Miller Rubber Company under his contract of November 6, 1911, to cover collections made by said W. D. Newerf and not remitted to The Miller Rubber Company. The note of June 12, 1914, and the notes of June 15, 1914, were not paid at maturity [129] but were renewed and are still outstanding and unpaid. On July 15, 1914, the said W. D. Newerf gave six (6) additional notes aggregating twelve thousand seven hundred forty-nine and nine hundredths (\$12,749.09) dollars due November 15, 1914, which were not paid but were renewed on November 15, 1914, which said renewed notes have not been paid. On September 14, 1914, said W. D. Newerf gave a note for one thousand (\$1,000) dollars due December 14, 1914, which said note was renewed December 14, 1914, and is unpaid. The total amount due on the notes of the said W. D. Newerf to The Miller Rubber Company, not including interest, is now twenty-six thousand five hundred and sixty-one and sixty-two hundredths (\$26,561.62) dollars; that the leaves from the books of original entry of The Miller Rubber Company show the credits given to the said W. D. Newerf, the issuing of the aforesaid notes and the charges made to said W. D. Newerf on failure to pay said notes; that the leaves of said books show as follows: The amount due from the said W. D. Newerf to The Miller Rubber Company under the contract of November 6, 1911, for collections made by said W. D. Newerf and not remitted, on Los Angeles accounts, two thousand four hundred fifty and nine-

teen hundredths (\$2,450.19) dollars; notes unpaid, eight thousand one hundred forty-nine and thirty-five hundredths (\$8,149.35) dollars; on San Francisco accounts seven hundred dollars and ninety-four cents (\$700.94), a total of eleven thousand three hundred dollars forty-eight cents (\$11,300.48): that, as against said charges, said W. D. Newerf is to be credited with the ten thousand eight hundred sixty-nine and eighty-seven hundredths (\$10,869.87) dollars leaving a balance due to The Miller Rubber Company on open account from collections made by him under the contract of November 6, 1911, and not remitted of four hundred thirty and sixty-one hundredths (\$430.61) dollars; that the said W. D. Newerf is chargeable with, Los Angeles business, three thousand seven hundred twenty-two and eighty-two hundredths [130] (\$3,722.82) dollars, San Francisco business, seven hundred thirty-six and forty-four hundredths (\$736.44) dollars, on San Bernardino business four hundred ninety-five and thirteen hundredths (\$495.13) dollars, or a total of four thousand nine hundred fifty-four and *thirty-nine* hundredths (\$4,954.13) dollars, all of which said items were charged to the said W. D. Newerf's open account and all commissions accruing to the said W. D. Newerf after October 1914, were applied in payment of this open account as follows:

November, 1914, commissions . . . . .	\$1,406.39
December, 1914, commissions . . . . .	1,129.06
January, 1915, commissions . . . . .	1,123.37
February, 1915, commissions . . . . .	645.13
March 1 to 20, 1915, commissions . .	1,123.72

making an aggregate credit of five thousand, four hundred twenty-eight and seventeen hundredths (\$5,428.17) dollars; that, after giving said W. D. Newerf credit for all of said items, the whole account shows a balance due from the said W. D. Newerf to The Miller Rubber Company, in addition to the amount due on the aforesaid described notes, the sum of six hundred fifty and seventy hundredths (\$650.70) dollars; that witness's exhibit K, being the leaves from the books of original entry, contains a full summary and statement of said figures, to wit, six hundred fifty and seventy hundredths (\$650.70) dollars; that statements of commissions, accounts due to said W. D. Newerf, July 14, 1914, to March 20, 1915, were sent to said W. D. Newerf every month as completed; that, at no time, during said period, did The Miller Rubber Company send a check for any part of said commissions but informed the said W. D. Newerf that these commissions were credited on his open account and that, at no time during said period, did the said W. D. Newerf object to the application of said commissions to his open account; that all of said notes were given to the said The Miller Rubber Company by said W. D. Newerf to cover money collected by him under [131] the contract of November 6, 1911, with The Miller Rubber Company for collections made by him under said contract and not remitted to The Miller Rubber Company; that none of said notes were given on account of the contract of 1914, between said W. D. Newerf and The Miller Rubber Company of California; that The Miller Rubber

Company has received statements from said W. D. Newerf, wherein he claims, as commissions for July 1, 1914, to March 20, 1915, aggregating fifteen thousand, four hundred six and forty hundredths (\$15,406.40) dollars; that, according to said W. D. Newerf, the credit of one thousand, one hundred seventy-five and forty-six hundredths (\$1,175.46) dollars is to be given to The Miller Rubber Company, under date of December 31, 1914, to set off charges made against The Miller Rubber Company on business where customers had taken advantage of the five per cent (5%) discount. This leaves, Mr. Newerf claims, for commissions, fourteen thousand, two hundred thirty and ninety-four (\$14,230.94) dollars for said period. This difference between the amount claimed by Mr. Newerf as commissions for said period of fourteen thousand, two hundred thirty and ninety-four hundredths (\$14,230.94) dollars, and the amount of commissions allowed to The Miller Rubber Company, to wit, thirteen thousand, two hundred forty-five and seventy-two hundredths (\$13,245.72) dollars is probably to be accounted for by the failure of Mr. Newerf to give The Miller Rubber Company credit for overcharges in commissions where customers took advantage of the five per cent (5%) discount; that the aggregate amount due The Miller Rubber Company from the said W. D. Newerf, according to the books of The Miller Rubber Company, to the witness's own personal knowledge, is twenty-seven thousand, two hundred twelve and twenty-nine hundredths (\$27,212.29) dollars, of which amount twenty-six thousand, five hundred

sixty-one and sixty-two hundredths (\$26,561.62) dollars is on said notes and said six hundred fifty and sixty-one hundredths (\$650.61) dollars, as aforesaid, is the balance due on open [132] account from said W. D. Newerf to the Miller Rubber Company; that the data and figures to make up the aforesaid books of the Miller Rubber Company, to all of which witness testifies, were made from no other source than reports by the said W. D. Newerf to The Miller Rubber Company, pursuant to contract.

Mr. F. B. Thiess testifies: I am treasurer of The Miller Rubber Company and The Miller Rubber Company of California and I am personally familiar with transactions between both companies and the said W. D. Newerf. I am familiar with the contract of November 6, 1911. Said W. D. Newerf and The Miller Rubber Company operated under said contract of June, 1914, when The Miller Rubber Company was incorporated, and said new contract was made between The Miller Rubber Company of California and the said W. D. Newerf. All commissions, complaints, repairs, and replacements, under the contract of November 6, 1911, were taken care of by The Miller Rubber Company after the contract of 1914, as stated above, was entered into. The commissions due to said W. D. Newerf, under the 1914 contract, as stated by me above, were credited on the books of The Miller Rubber Company to his old (1911) open account and The Miller Rubber Company and The Miller Rubber Company of California never received any objections from Mr. Newerf to its being done that way; the executive

committee of The Miller Rubber Company, to wit, Jacob Pfeiffer, William F. Pleiffer and witness, know said W. D. Newerf's commissions under contract of November 6, 1911, were credited on old (contract of November 6, 1911) open account and said executive committee directed that this be done; The Miller Rubber Company of California was organized and is acting as the agent of The Miller Rubber Company in the State of California; it keeps no books nor records other than of its organization and minutes and all business is entered on the books of The Miller Rubber Company only; all bills and accounts receivable are credited to The Miller Rubber Company of California; The Miller Rubber Company of California [133] was organized May, 1913; prior to that date, The Miller Rubber Company operated in California under the contract of November 6, 1911, with said W. D. Newerf, by which The Miller Rubber Company shipped goods to said W. D. Newerf on consignment, reserving title to itself until sold by said W. D. Newerf; W. D. Newerf made collections on sales and agreed to remit the proceeds to The Miller Rubber Company at Akron, Ohio, and he took no title to any of said goods and *he* never claimed title to any of said goods so shipped to him or any interest in them, except the right to sell them; under the contract of 1914, all goods shipped under the name of The Miller Rubber Company were shipped to The Miller Rubber Company of California as the agency of The Miller Rubber Company.

## XII.

The said District Court erred, under the evidence

and the law, in its finding, decision and judgment denying the petition for reclamation, and in affirming the order theretofore made by the Special Master denying said petition.

WHEREFORE, the said petitioner for reclamation prays that said order of final decree and judgment of said District Court be reversed and that the said District Court may, by mandate, be directed to enter a final order and decree allowing the petition for reclamation and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company and The  
Miller Rubber Company of California.

Filed Dec. 7, 1915, at 30 min. past. 4 o'clock P. M.  
Wm. M. Van Dyke, Clerk. Murray C, White, Deputy.

[134] (Caption.)

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**Notice of Motion [to Receive Depositions in Evidence, etc.].**

To Citizens Trust & Savings Bank, Trustee in Bankruptcy; To Norman A. Bailie and Dave F. Smith, Attorneys for the Trustee:

You and each of you will take notice that on Monday, August 2d, 1915, at 10 o'clock A. M., or as soon thereafter as the Court will hear the same, The Miller Rubber Company and The Miller Rubber Company of California, will, while denying that the issues between said companies and the trustee herein

have been duly, regularly or rightfully closed, move the Court to receive in evidence the depositions to be filed herein, or to refer said case, and the issues therein to the Special Master again for determination of the questions still at issue between the parties and to receive in evidence for that purpose the depositions to be filed as per notice heretofore served and filed herein.

Said notice will be based upon the records, files and proceedings of the issues between The Miller Rubber Company, The Miller Rubber Company of California, and the said trustee in bankruptcy herein, and the affidavits of W. C. Smith, one of the attorneys of record for the claimants herein, and C. R. Wetsel, copies of which have been duly served and filed herein.

Dated July 28, 1915.

BICKSLER, SMITH & PARKE,  
Attorneys for The Miller Rubber Company, and The  
Miller Rubber Company of California.

Filed July 29, 1915, at 35 min. past 10 o'clock  
A. M. Wm Van Dyke, Clerk. Murray C. White,  
Deputy.

[135] *In the District Court of the United States, Southern District of California, Southern Division.*

In re W. D. NEWERF, Bankrupt—No. 1972.  
THE MILLER RUBBER COMPANY, and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt.

Appellee.

**Order Extending Time to [February 1, 1916 to]  
file Transcript [Copy].**

Good cause appearing therefor, it is hereby or-  
dered, that the time allowed appellants to docket said  
cause and file the record thereof with the clerk of  
the United States Circuit Court of Appeals for the  
Ninth Circuit, be, and the same is hereby, enlarged  
and extended to and including the first day of Feb-  
ruary, 1916.

Dated at Los Angeles, California, December 20,  
1915.

R. S. BEAN,  
United States District Judge, Southern District of  
California.

[136]    *In the District Court of the United States,  
Southern District of California, Southern Di-  
vision.*

In re W. D. NEWERF, Bankrupt—No. 1972.  
THE MILLER RUBBER COMPANY, and THE  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations,

Appellants,

vs.

CITIZENS TRUST AND SAVINGS BANK, a  
Corporation, as Trustee of the Estate of W. D.  
NEWERF, Doing Business as the W. D.  
NEWERF RUBBER COMPANY, Bank-  
rupt.

Appellee.

**Order Allowing Transcript on Appeal [of Miller  
Rubber Co. et al.].**

The foregoing transcript on appeal, including the testimony herein, having been submitted to the Court for approval, now upon stipulation of parties duly signed and filed herein, it is ordered that the foregoing testimony, documents and papers be, and the same hereby are, made the record for the purpose of said appeals, all of which is done within the time required by law.

Dated at Los Angeles, California, this 10th day of January, 1916.

R. S. BEAN,  
Judge.

**[Stipulation that Transcript is True and Correct,  
etc.]**

Stipulated the foregoing transcript is true and correct and may be approved at once.

BICKSLER, SMITH & PARKE,  
Attorneys for Appellants.  
W. T. CRAIG,  
DAVE F. SMITH,  
NORMAND A. BAILIE,  
Attorneys for Appellee.

Dated Jany. 6, 1916.

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**[Certificate of Clerk, U. S. District Court to Transcript of Record on Appeal of Miller Rubber Co., et al.]**

*In the District Court of the United States in and for the Southern District of California, Southern Division.*

No. 1972—BKCY.,

In the Matter of W. D. NEWERF,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the foregoing one hundred and thirty-six (136) typewritten pages, numbered from 1 to 136, inclusive, and comprised in one (1) volume, are true and correct copies of the record and proceedings upon the petition of The Miller Rubber Company, and

The Miller Rubber Company of California, against the Citizens Trust and Savings Bank, a Corporation, as trustee in bankruptcy of the estate of W. D. Newerf, Bankrupt, in the matter of W. D. Newerf, Bankrupt, No. 1972—Bankruptcy, Southern Division, as contained in the transcript on appeal prepared by the appellant, pursuant to the stipulation of the parties, and approved by the Honorable R. S. Bean, District Judge and filed herein.

I do further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$81 20/100, the amount whereof has been paid me by the attorneys of record for the appellant in the above-entitled matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 13th day of January, in the year of our Lord, one thousand, nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,  
Clerk, U. S. District Court for the Southern District of California,

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
1/13/16. L. S. C.]

[Endorsed]: No. 2737. United States Circuit Court of Appeals for the Ninth Circuit. The Miller Rubber Company, a Corporation, and The Miller Rubber Company of California, a Corporation, Appellants, vs. Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Doing Business as W. D. Newerf Rubber Company, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 17, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the District Court of the United States, Southern District of California, Southern Division.*

In re W. D. NEWERF, Bankrupt—No. 1972.

THE MILLER RUBBER COMPANY, and THE MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellants,  
vs.

CITIZENS TRUST AND SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as the W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellee.

**Order Extending Time to [February 1, 1916, to] File  
Transcript [Original].**

Good cause appearing therefore, it is hereby ordered, that the time allowed appellants to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the first day of Feb., 1916.

Dated at Los Angeles, California, December 20, 1915.

R. S. BEAN,  
United States District Judge, Southern District of California.

[Endorsed]: No. 1972. In the United States District Court, Southern District of California, Southern Division. In the Matter of W. D. Newerf, Bankrupt. Order Extending Time to File Transcript. Filed Dec. 20, 1915. Wm. M. Van Dyke, Clerk. F. F. Green, Deputy.

No. 2737. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 1, 1916, to File Record thereof and to Docket Case. Filed Jan. 17, 1916. F. D. Monckton, Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,

Appellant,

vs.

MILLER RUBBER COMPANY, a Corporation, and  
MILLER RUBBER COMPANY OF CALIFORNIA, a Corporation,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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**Names and Addresses of Attorneys [on Appeal of  
Citizens Trust & Savings Bank].**

For Appellant, Citizens Trust and Savings Bank, a Corporation, Trustee, of W. D. Newerf, Bankrupt:

NORMAN A. BAILIE, Esq., Suite 831 Higgins Building, Los Angeles, California.

For Appellees, Miller Rubber Company and Miller Rubber Company, of California, Corporations:

Messrs. BICKSLER, SMITH & PARKE, 827-829 Citizens National Bank Building, Los Angeles, California. [3\*]

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*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

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\*Page-number appearing at foot of page of original certified Record.

**Citation on Appeal of Citizens Trust & Savings  
Bank (Original).**

To THE MILLER RUBBER COMPANY AND  
MILLER RUBBER COMPANY OF CALI-  
FORNIA, Corporations:

YOU ARE HEREBY CITED and admonished to be and appear at a session of the United States Circuit Court of Appeals in the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 1st day of February, 1916, pursuant to the petition on appeal and assignments of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, holding terms in the city of Los Angeles, in said District in the above-entitled proceeding, in which Citizens Trust & Savings Bank, a corporation, as trustee of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, is petitioner and claimant, to show cause if any there be, why the final decree and judgment rendered in such case reversing the order and decree of the Special Master by which order and decree the Miller Rubber Company of California, or its bondsman is ordred to pay to the trustee herein, Citizens Trust & Savings Bank, a corporation, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4495.25), being [4] the amount of commissions still due the Bankrupt from said Miller Rubber Company of California, and the other matters and things as in said petition on appeal and assignments of error mentioned and set

forth should not be reversed, set aside and corrected; and why speedy justice should not be done to said Citizens Trust & Savings Bank, a corporation, Trustee, in that behalf.

WITNESS the Honorable ERSKINE M. ROSS, Judge of the United States District Court for the Southern District of California, Southern Division, this 3d day of January, 1916.

ERSKINE M. ROSS,  
Circuit Judge.

[5]

[Endorsed]: Original. No. 1972—Bkey. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company. Citation on Appeal. Filed Jan. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Service of the within Citation is hereby admitted this 3d day of January 1916.

BICKSLER, SMITH & PARKE,  
Attorney for Appellee.

[6]

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*In the District Court of the United States, in and for  
the Southern District of California, Southern  
Division.*

No. 1972—BKCY.

In the Matter of W. D. NEWERF,

Bankrupt.

[7]

ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER RUBBER OF CALIFORNIA, Corporations,

Appellees.

**Petition on Appeal [of Citizens Trust & Savings Bank].**

To the Honorable Judges of the District Court of the United States, Southern District of California, Southern Division:

Comes now Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, respondent for the reclamation of certain goods, wares, and merchandise, in the hands of said trustee, as by the records and files of this court in this proceeding more fully appear, and considering itself aggrieved by the order and final decree of this Court made and entered November 22d, 1915, reversing the order of the Special Master herein, and refusing to render judgment in favor of said trustee, and against

Miller Rubber Company of California, for the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), said order of the Special Master having been made and entered on or about the 13th day of July, 1915, does hereby appeal from said order and final decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason and [8] upon the grounds set forth in its assignments of error filed herewith.

Your petitioner prays that its said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and final decree were made, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue to the Miller Rubber Company of California, to be and appear in said Circuit Court of Appeals on a date certain, as provided by law.

Dated December 30, 1915.

W. T. CRAIG,

DAVE F. SMITH,

NORMAN A. BAILIE,

Attorneys for Citizens Trust & Savings Bank,  
Trustee in Bankruptcy of the Estate of W. D.  
Newerf, Doing Business as W. D. Newerf Rubber  
Company, Bankrupt.

[Endorsed]: Original. No. 1972—Bankruptcy.  
United States District Court Southern District of California Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company, Petition on Appeal. Service of the within petition is hereby admitted this 31 day of Dec., 1915. Bicksler,

Smith & Parke Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622. Attorney for Trustee. Filed Dec. 31, 1915, at 10 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk, Murray C. White, Deputy. [9]

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ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

**Assignments of Error [ on Appeal of Citizens Trust & Savings Bank].**

Comes now Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, respondent for the reclamation of certain goods, wares and merchandise in the hands of the said trustee, and petitioner on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and final decree of the above-entitled District Court,

made and entered November 22d, 1915, and reversing the decree and order of the Special Master declaring that said trustee is entitled to recover from the Miller Rubber Company of California, or its bondsman, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), the amount of commissions found by said Special Master to be still due bankrupt from said Miller Rubber Company of California, and herewith makes the following assignments of error: [10]

1. The said District Court erred in its finding, decision and judgment under the evidence and the law that there was not due and owing to said trustee from the Miller Rubber Company of California the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), or any other sum, as commissions still due bankrupt from the Miller Rubber Company of California, against which there was no offset whatsoever.
2. The said District Court erred, failing to find as a matter of law under the evidence that the actual selling price of goods sold by W. D. Newerf, Agent of the Miller Rubber Company of California, there was not due and owing to said trustee from under the contract of June 11th, 1914, was the amount at which said merchandise was billed, whether or not the customer purchasing said goods took advantage of the five per cent (5%) discount offered for cash.

3. The said District Court erred in its finding, decision and judgment that the actual selling price of the goods sold by W. D. Newerf, Agent of the Miller Rubber Company of California, under the

contract of June 11th, 1914, where goods were sold for cash, was the invoice price of said goods less the five per cent (5%) allowed for cash.

WHEREFORE, said respondent for reclamation prays that the order of final decree and judgment of said District Court reversing the finding of the Special Master herein that the said trustee in bankruptcy is entitled to recover from the Miller Rubber Company of California, or its bondsman, the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), the amount of commissions still due Bankrupt from the Miller Rubber Company of California, against which there is no offset whatsoever, be reversed, and that the said District Court may be [11] mandate, be directed to enter *and* final order and decree to the affect that the Citizens Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, do have and recover of and from the Miller Rubber Company of California, a corporation, or its bondsman, American Surety Company, a corporation the sum of Forty-four Hundred Ninety-five and 25/100 Dollars (\$4,495.25), and allowing all of the other matters and things in which it is herein set forth and alleged that the said District Court erred:

DAVE F. SMITH,

NORMAN A. BAILIE,

W. T. CRAIG,

Attorneys for Citizens Trust & Savings Bank,  
Trustee in Bankruptcy of the Estate of W. D.  
Newerf, Doing Business as W. D. Newerf  
Rubber Company, Bankrupt.

[Endorsed]: Original. No. 1972—Bankruptcy United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company, et al. Assignments of Error. Service of the within petition is hereby admitted this 31 day of Dec., 1915. Bicksler, Smith & Parke, Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg, Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Trustee. Filed Dec, 31, 1915, at 10 min, past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murrey C. White, Deputy. [12]

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ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

CITIZENS TRUST & SAVINGS BANK, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, Bankrupt,  
Appellant,

vs.

MILLER RUBBER COMPANY, and MILLER RUBBER COMPANY OF CALIFORNIA, Corporations,

Appellees.

**Order Granting Appeal [of Citizens Trust & Savings Bank].**

The petitioner, Citizens Trust & Savings Bank, a corporation, Trustee in Bankruptcy of the Estate of

W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, having heretofore filed its petition for appeal and therewith assignments of error, together with its bond in the penal sum of Two Hundred Fifty Dollars (\$250) conditioned as required by law, with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, and having further given due notice to the Miller Rubber Company of California, of its said petition and said bond, and the time of presenting same, ,

IT IS ORDERED that the said appeal be, and the same is hereby allowed to the said respondent.

IT IS FURTHER ORDERED that citation issue to the Miller Rubber Company of California, a corporation, as provided by law. [13]

Done in open court at the city of Los Angeles, district aforesaid, this 31st day of December, 1915.

ROSS,  
Circuit Judge.

[Endorsed]: Original. No. 1972—Bankruptcy. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank vs. Miller Rubber Company. Order Granting Appeal. Service of the within order is hereby admitted this 31 day of Dec., 1915. Bicksler, Smith & Parke, Attorneys for Appellee. Norman A. Bailie, Suite 831 Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Trustee. Filed Dec. 31, 1915, at 30 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [14]

[**Stipulation that Transcript on Appeal of Miller Rubber Co. et al. may be Used as Transcript on Appeal of Citizens Trust & Savings Bank.]**

ORIGINAL.

*In the District Court of the United States, Southern District of California, Southern Division.*

**CITIZENS TRUST & SAVINGS BANK**, a Corporation, as Trustee of the Estate of W. D. NEWERF, Doing Business as W. D. NEWERF RUBBER COMPANY, BANKRUPT,  
Appellant,

vs.

**MILLER RUBBER COMPANY**, and **MILLER RUBBER COMPANY OF CALIFORNIA**, Corporations,

Appellees.

**STIPULATION IN RE TRANSCRIPT.**

IT IS HEREBY STIPULATED and agreed by and between appellant and appellees in the above-entitled appeal by their respective counsel that the transcript on the appeal of Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation, appellants against Citizens Trust & Savings Bank, a corporation, as trustee in bankruptcy of the estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt, appellees, may be used and serve as and for the transcript on this appeal to the same purpose and with the same effect as if a separate transcript had

been filed in this appeal. [15]

Dated December 31, 1915.

W. T. CRAIG,

DAVE F. SMITH,

NORMAN A. BAILIE,

Attorneys for Appellant.

BICKSLER, SMITH & PARKE,

Attorneys for Appellees.

[Endorsed]: Original. No. 1972—Bankruptcy. United States District Court, Southern District of California, Southern Division. Citizens Trust & Savings Bank, Appellant, vs. Miller Rubber Company et al., Appellees. Stipulation in re Transcript. Service of the within is hereby admitted this — day of —, 191—, Attorney for —. Norman A. Bailie, Suite 831, Higgins Bldg., Second & Main Sts., Los Angeles, Cal., Phones: Home 10112, Main 4622, Attorney for Appellant. Filed Dec. 31, 1915, at 10 min. past 2 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [16]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California.*

Clerk's Office.

No. —.

CITIZENS TRUST AND SAVINGS BANK, a Corporation, Trustee,

vs.

MILLER RUBBER COMPANY and MILLER RUBBER CO. OF CAL., Corporations.

**Praecipe [for Transcript of Record on Appeal of Citizens Trust & Savings Bank].**

To the Clerk of said Court:

Sir: Please issue a certified transcript of the record on appeal consisting of the following papers:

Petition for Appeal.

Order Granting Appeal.

Assignments of Error.

Citation on Appeal.

Stipulation in re Transcript.

W. T. CRAIG,

DAVE F. SMITH, and

NORMAN A. BAILIE,

Attorneys for Appellant.

[Endorsed]: Received copy of the within praecipe this 3d day of January, 1916. Bicksler, Smith & Parke, Attorneys for Appellee. No. 1972—Bankruptcy. U. S. District Court, Southern District of California. In the Matter of W. D. Newerf, Bank-

rupt. Praeclipe for Transcript on Appeal. Filed Jan. 3, 1916, at 50 min. past 4 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [17]

[Certificate of Clerk U. S. District Court to Transcript of Record on Appeal of Citizens Trust & Savings Bank.]

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*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 1972—BKCY.

In the Matter of W. D. NEWERF,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventeen (17) typewritten pages, numbered from 1 to 17, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the petition for appeal by the Citizens Trust and Savings Bank, a Corporation, trustee, assignments of error by said appellant, order granting appeal, stipulation in re transcript and *praecipe* for transcript on appeal, in the above and therein entitled matter, and I do further certify that the same together constitute the record on appeal of said Citizens Trust and Savings Bank, a Corporation, trustee, as specified in said *praecipe* for transcript on appeal.

I do further certify that the cost of the foregoing

transcript on appeal is \$6.00, the amount whereof has been paid me by the attorneys of record for the Citizens Trust and Savings Bank, a Corporation, trustee, the above-named appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand [18] and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 14th day of January, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer.

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
1/14/16. L. S. C.] [19]

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[Endorsed]: No. 2737. United States Circuit Court of Appeals for the Ninth Circuit. Citizens Trust and Savings Bank, a Corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, Doing Business as W. D. Newerf Rubber Company, Bankrupt, Appellant, vs. Miller Rubber Company, a Corporation, and Miller Rubber Company of California, a Corporation, Appellees. Transcript of Record.

Upon Appeal from the United States District Court  
for the Southern District of California, Southern  
Division.

Filed January 17, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Ap-  
peals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.